Supreme Court U.S.
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No. (1)

IN THE

Supreme Court of the United States

SAN PAOLO U.S. HOLDING COMPANY, INC.,

Petitioner,

vs.

LIONEL SIMON, dba LIBERTY PAPER COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEAL OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION FOUR

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(i) When a punitive damage award which has been paid is determined on appeal to be constitutionally excessive and reduced from $1,700,000 to $50,000, is the appellant constitutionally entitled to an award of interest as a component of restitution of the overpayment?

(ii) Does the denial of an award of interest (here, over $925,000) to a defendant who has been forced by a court to pay a punitive damage award which is subsequently determined to be constitutionally excessive constitute an unlawful taking of property without just compensation under the Fifth and Fourteenth Amendments?

(iii) Is the mandate of this Court in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001) and *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408 (2003) defeated when interest is not included in awards of restitution to defendants who have been forced by courts to pay constitutionally excessive punitive damage awards?

(iv) When the recipient of funds paid on a judgment or order which is subsequently reversed or modified has admittedly earned interest on these funds, should restitution include, at a minimum, all amounts earned by the recipient on these funds while in his possession?

(v) Whether this Court will issue a peremptory order which awards interest to compensate Petitioner for the loss of use of funds paid on an unconstitutional punitive damage award.

PARTIES TO THE PROCEEDING

The parties to the proceeding are Lionel Simon, doing business as Liberty Paper Company, the Plaintiff in the underlying action, and Defendant San Paolo U.S. Holding Co., Inc., the Petitioner herein. San Paolo U.S. Holding Co., Inc., is a corporation formed and existing under the laws of the State of Delaware, and is a subsidiary of Istituto Bancario San Paolo di Torino-Istituto Mobiliare Italiano S.p.A. ("San Paolo-IMI"), a banking association organized under the laws of the Republic of Italy. San Paolo-IMI operates a branch in New York, New York, under the name San Paolo Bank, which was a Defendant in this action but is not a party to this Petition.

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PETITION FOR WRIT OF CERTIORARI

San Paolo U.S. Holding Co., Inc. ("San Paolo"), returns to this Court for a third time in this case for further relief and respectfully petitions for a Writ of Certiorari to review the decision of the Court of Appeal of California, Second Appellate District, Division Four (the "Court of Appeal"). In the alternative, San Paolo requests a peremptory order which awards it interest on its payment of a constitutionally excessive punitive damage award.

OPINIONS BELOW

The Order of this Court granting San Paolo's first Petition for Writ of Certiorari, vacating the judgment of the Court of Appeal, and remanding the case for consideration in light of *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001), is reported as *San Paolo U.S. Holding Company, Inc. v. Simon*, 121 S.Ct. 2190 (2001). (App., *infra*, G-1-2.) The Order of this Court granting San Paolo's second Petition for Writ of Certiorari, vacating the second judgment of the Court of Appeal, and remanding the case for consideration in light of *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408 (2003), is reported as *San Paolo U.S. Holding Company, Inc. v. Simon*, 123 S.Ct. 1828 (2003). (App., *infra*, H-1-2.) The decision of the California Supreme Court reversing the judgment of the Court of Appeal and modifying the judgment of the Superior Court of Los Angeles County to reduce the award of punitive damages from $1,[illegible]00 to $50,000 (App., *infra*, B-1-37) is reported at *Simon v. San Paolo U.S. Holding Co, Inc.*, 35 Cal.4th 1159 (2005).

The subsequent decision of the Court of Appeal determining that San Paolo is not entitled to recover any interest on the amount it was forced to pay Simon on account of the original excessive punitive damage award (App., *infra*, A-1-12) is unreported. The denial of San Paolo's Petition for Rehearing by the Court of Appeal (App., *infra*, C-1) is unreported. The denial of San Paolo's Petition for Review by the California Supreme Court (App., *infra*, D-1) is unreported.

JURISDICTION OF THIS COURT

On November 8, 2005, the Court of Appeal of California, Second Appellate District, Division Four, filed its most recent Opinion (unpublished) in this case. On December 1, 2005, the Court of Appeal issued its Order denying San Paolo's Petition for Rehearing. On January 25, 2006, the California Supreme Court, *en banc*, issued its Order denying San Paolo's Petition for Review. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution provides in relevant part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment, Section 1, of the United States Constitution provides in relevant part:

. . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

A. Introduction

As this Honorable Court is well aware, and as the Court of Appeal has acknowledged, "[t]his case has a long history." (App., *infra*, A-2.) On or about April 20, 1998, eight years ago, San Paolo U.S. Holding Company, Inc. ("San Paolo") filed its Notice of Appeal from the Judgment entered in favor of Lionel Simon dba Liberty Paper Company ("Simon"), awarding him $1,700,000.00 in punitive damages against compensatory damages for purely economic harm in the sum of only $5,000.00. Among other things, San Paolo challenged the punitive damage award as excessive under the Due Process Clause of the Fourteenth Amendment. Of the three Opinions of the Court of Appeal affirming the Judgment, two were vacated by this Court and, most recently, the third was reversed by the California Supreme Court. San Paolo's rights were vindicated, and the punitive damage award to Simon was reduced from $1,700,000 to $50,000. *Simon v. San Paolo U.S. Holding Co., Inc.*, 35 Cal.4th 1159, 1189-1190 (2005). Throughout the majority of this time, Simon wrongfully retained, refused to return, and had the use of over $2,000,000 of San Paolo's money.

Initially, San Paolo posted a bond to prevent all collection efforts. Unfortunately, after the filing of San Paolo's first Petition for Writ of Certiorari to this Court, Simon opposed San Paolo's efforts to continue the bond and demanded payment of the Judgment. As a result, San Paolo was forced

to pay to Simon the entire Judgment plus costs and interest at the rate of ten percent per annum ($2,232,194.12). Simon demanded the money, kept it, earned interest on it, and refused to return it despite the two rulings of this Court (and despite San Paolo's repeated offers of a new Appeal Bond).[1] Over four years later, the California Supreme Court filed its Opinion substantially reducing the punitive damage award from $1,700,000 to $50,000 consistent with *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* (2001) 532 U.S. 424, and other United States Supreme Court precedent. *Simon v. San Paolo U.S. Holding Co., Inc.*, *supra*, 35 Cal.4th at 1189-1190.

Simon finally delivered to San Paolo payment of the remitted amount. Despite having profited from his use of the money, Simon refused to pay any interest on the sums he had held for over four years, which, at the California statutory rate of ten percent, would exceed $925,000.00, nor did he pay the costs awarded by this Court on two occasions. Instead of seeking a ruling from the California Supreme Court, Simon filed his Motion to Determine if Interest is Owed by Plaintiff ("Motion") with the Court of Appeal just two days after the California Supreme Court issued its Remittitur. The Court of Appeal issued an Opinion granting Simon's Motion and denying San Paolo any interest on the remitted portion of the

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[1] Simon constantly refused to return the money, even after the Judgment was twice vacated by this Court. Further, Simon opposed a Motion filed by San Paolo with the Court of Appeal to compel restitution after the grant of the first Writ Petition. In taking these very aggressive acts, Simon wanted the money. In doing so, he accepted the risk that he would one day have to return it, with interest. Simply put, Simon wanted his money, compelled San Paolo to pay it and, upon receipt, refused to relinquish it under any circumstance.

Judgment which it was required but ultimately should not have had to pay. This latest Opinion of the Court of Appeal demonstrates that the Courts and litigants of this Nation are in need of clear guidance on a party's right to recover interest on funds paid on a punitive damage award which is subsequently determined to be constitutionally excessive.

B. Factual Background

As this Court may recall, this lawsuit has its genesis in the failed efforts of Simon to purchase a commercial office building (the "Property") from San Paolo. The Property was first acquired by San Paolo on January 17, 1996, through a foreclosure sale. (Reporter's Transcript ["R.T."], p. 1469, ll. 19-20.[2]) Shortly thereafter, Simon made his first inquiry relating to the purchase of the Property. Throughout the next six months, the parties engaged in three different sets of negotiations relating to Simon's attempts to purchase the Property. The closest that Simon ever came to purchasing the Property was in June 1996, when the parties prepared a written, non-binding Letter of Intent. (Joint Appendix in Lieu of Clerk's Transcript ["App."] Vol. III, pp. 1864 -1871; App. Vol. VII, pp. 1864 - 1871; R.T., p. 1475, ll. 3-25.) Although the Letter of Intent was eventually signed and Simon and San Paolo continued to negotiate the terms of the proposed sale of the Property, the transaction ultimately failed, and the Property was sold by San Paolo to a third party for less money in August, 1996. (App. Vol. III, pp. 1901-1908, 1925; App. Vol. VII, pp. 1872-1900; R.T., p. 1569, ll. 14-21.)

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[2] The Joint Appendix in Lieu of Clerk's Transcript and the Reporter's Transcripts referenced herein are part of the record on appeal below.

C. Procedural Background and Presentation of the *Federal Question*

On June 21, 1996, Simon filed his Complaint against San Paolo for Breach of Contract, Specific Performance, Breach of the Implied Covenant of Good Faith and Fair Dealing, and False Promise, all founded upon an alleged promise by San Paolo to sell him the Property. (App. Vol. I, pp. 1-18.)

On August 4, 1997, the case went to trial on the remaining causes of action against San Paolo for Breach of Contract and False Promise. Simon sought damages for not only the alleged lost value in the Property, but also the consequential damages incurred in retaining an attorney to review the transaction. (R.T. p. 1915, ll. 7-12; p. 1916, ll. 3-6; p. 1927, ll. 15-16.) The jury returned a verdict in favor of San Paolo on the cause of action for Breach of Contract and in favor of Simon on the cause of action for False Promise, awarding the sum of $5,000.00 as actual damages and nothing for the alleged lost value in the Property. In the punitive damage phase, Simon was awarded the sum of $2,500,000.00. (App. Vol. III, pp. 613-618.)

San Paolo then filed its Motions for (a) Judgment Notwithstanding the Verdict (which the trial court denied); and (b) New Trial or, Alternatively, For Remittitur of Excessive Damages. In these Motions, among other things, San Paolo asserted that the punitive damage award, which was 500 times the award of actual damages, was grossly excessive as a matter of law and violative of San Paolo's due process rights pursuant to this Court's decision in *BMW of North America v. Gore* ("*BMW*"), 517 U.S. 559 (1996) and related authorities. (App. Vol. III, pp. 634-635, 646-647; Vol. IV, pp. 1040-1044.) The trial court ruled that it would grant the Motion for New Trial unless Simon accepted the reduced punitive damage award of $250,000.00. (App. Vol. IV, p. 1050; Vol. V, p. 1228.) Simon rejected the reduced award

and elected to proceed with a new trial.

On March 9, 1998, the new trial went forward on the limited issue of the amount of the punitive damages, if any, to be awarded to Simon (the "Second Trial"). The second jury returned a verdict in favor of Simon for punitive damages of $1,700,000.00. (App. Vol. VII, pp. 1808-1815.) Thereafter, San Paolo filed a Motion for New Trial, or Alternatively, for Remittitur of Excessive Damages. (App. Vol. VI, pp. 1518-1520; Vol. VII, pp. 2010-2029.) Again, San Paolo posited that the award of punitive damages in an amount 340 times the actual damages awarded was excessive as a matter of law and violative of its federal due process rights. (App. Vol. VI, p. 1519; Vol. VII, pp. 2021-2023.) The trial court denied the Motion. Judgment was then entered on April 8, 1998, finding in favor of San Paolo on the claim of Breach of Contract; finding in favor of Simon in the amount of $5,000.00 on the claim of False Promise; and awarding Simon punitive damages of $1,700,000.00. (App. Vol. VII, pp. 1808-1815.)

On or about April 20, 1998, San Paolo filed its Notice of Appeal from: (i) the Judgment entered on April 8, 1998, in favor of Simon for punitive damages of $1,700,000.00 on a false promise cause of action where the compensatory damages were only $5,000.00 and; (ii) various rulings upon which the Judgment was based. Simon subsequently filed a Notice of Cross-Appeal as to the verdict of the first jury on his breach of contract claim, among other things.

Shortly after entry of the Judgment, Simon commenced efforts to enforce the Judgment on San Paolo's assets in New York. On or about April 28, 1998, and again on April 29, 1998, San Paolo posted bonds totaling $2,585,063.00 to secure repayment of the Judgment and accrued interest thereon at ten percent during the pendency of its appeal. On August 28, 2000, the Court of Appeal filed its unpublished Opinion affirming the Judgment in its entirety. On December

18, 2000, the Clerk of the Court of Appeal issued a Remittitur, returning jurisdiction of this case to the Los Angeles Superior Court and restoring Simon's ability to collect the excessive punitive damage award.

On December 26, 2000, San Paolo filed a Motion for Recall and Stay of Issuance of Remittitur with the Court of Appeal based upon its intention to file a petition for writ of certiorari with this Court in light of the federal constitutional issues raised in this appeal. On January 10, 2001, over Simon's Opposition, the Court of Appeal filed an Order recalling the Remittitur and staying its issuance for 90 days from the date of the order "at which time it will terminate and the matter will be remanded to the trial court." Noting that the first bond filed by San Paolo in this appeal in the amount of $2,557,500.00 "may be deficient to pay the principal amount of the judgment and the accrued interest," the Court of Appeal invited San Paolo to "apply to the United States Supreme Court for any further stay."

On March 12, 2001, San Paolo filed its Petition for Writ of Certiorari based upon, among other things, the federal constitutional issues raised by the disproportion between the amounts of the awards of compensatory and punitive damages herein. On April 10, 2001, San Paolo filed an Application to Stay Remittitur of this Court Pending Certiorari (the "Stay Application"). On April 13, 2001, Associate Justice Sandra Day O'Connor signed an Order recalling and staying the Remittitur pending receipt of a response from Simon to the Stay Application and further order of the Court. (App., *infra*, E-1.) Simon subsequently filed his Opposition to the Stay Application. On April 24, 2001, before San Paolo had an opportunity to file a Reply to the Opposition, Associate Justice Sandra Day O'Connor signed an Order vacating the stay of the Remittitur previously issued and denying the Stay Application. (App., *infra*, F-1.) Again, the same day, Simon demanded payment of the Judgment plus interest of ten

percent per annum.

Simon refused to accept a new Appeal Bond in lieu of payment of the Judgment by San Paolo. Specifically, San Paolo "agreed to post a bond issued by a secure surety in the same amount as the bonds previously posted in this matter in exchange for the return of the entire sum paid by San Paolo . . . ." Simon repeatedly rejected this offer. In light of the denial of the Stay Application and Simon's rejection of a new Appeal Bond, San Paolo was compelled to satisfy the Judgment in its entirety before its federal constitutional challenges thereto were considered by this Court. On May 7, 2001, two weeks after this Court denied the Stay Application and Simon again demanded payment, San Paolo delivered to Simon payment of $2,232,194.12 in full satisfaction of the Judgment. (Motion, Exh. "D.") Throughout the remainder of the appellate process, Simon refused to accept a new Appeal Bond and return the money. At all relevant times, San Paolo advised Simon that, in the event of a reduction of the punitive damage award, Simon would be obligated to return the excess funds plus interest at the legal rate of ten percent per annum. (Motion, Exhs. "I, "K," "T.")

On May 29, 2001, just over three weeks after San Paolo paid the excessive punitive damage award, this Court granted San Paolo's Petition for Writ of Certiorari, vacated the judgment and remanded the case for further consideration in light of *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001). *San Paolo U.S. Holding Co., Inc. v. Simon*, 121 S.Ct. 2190 (2001); App., *infra*, G-1-2. On June 22, 2001, and again on July 3, 2001, San Paolo demanded that Simon return its payment of the Judgment. In exchange, San Paolo offered to post a bond from a secure surety during the pendency of this appeal. As an alternative to the return of the money, San Paolo proposed that "the parties can agree to escrow all of the funds to be safeguarded until this action is finally resolved, at which time the funds will be released to

the prevailing party upon the signature of counsel for both parties." (Declaration of Mitchell B. Ludwig in support of Motion for Restitution [defined below], Exh. "I.") Simon, however, defiantly refused to allow San Paolo to post a bond or to return or even escrow the funds.

On July 30, 2001, San Paolo filed a Motion for: (1) Recall of Issuance of Remittitur; and (2) Restitution of Payment of Judgment ("Motion for Restitution") with the Court of Appeal, wherein San Paolo requested, among other things, return of its payment of the Judgment, plus the statutory rate of ten percent interest per annum, in exchange for the posting of a new Appeal Bond. Simon opposed the Motion.

On November 7, 2001, the Court of Appeal filed its second Opinion affirming the Judgment in its entirety and denying the Motion for Restitution. (Opinion filed November 7, 2001, p. 38, n. 18.) On May 20, 2002, San Paolo filed its second Petition for Writ of Certiorari in this case. On April 21, 2003, for a second time, this Court granted San Paolo's Petition for Writ of Certiorari, vacated the judgment and remanded the case for further consideration, this time in light of *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003). *San Paolo U.S. Holding Co., Inc. v. Simon*, 123 S.Ct. 1828 (2003); App., *infra*, H-1-2.

On December 2, 2003, after further briefing and oral argument, the Court of Appeal issued its third Opinion in this case, again affirming the Judgment. On January 12, 2004, San Paolo filed a Petition for Review with the California Supreme Court. On March 24, 2004, the Petition for Review was granted. On April 7, 2005, the Supreme Court heard oral argument.

On June 16, 2005, the Supreme Court filed its Opinion, reversing the Judgment of the Court of Appeal and remanding it to that Court "with instructions that it modify the superior court judgment to reduce the award of punitive damages to $50,000 and affirm the judgment as modified." *Simon v. San*

Paolo U.S. Holding Co., Inc., 35 Cal.4th 1159, 1190 (2005). On July 19, 2005, after close of business, Simon delivered to the offices of counsel for San Paolo a check payable to San Paolo in the sum of $2,156,304.20, representing the difference between the amount paid by San Paolo in satisfaction of the Judgment over four years earlier and the reduced amount of the Judgment. The check did not include any interest or the costs awarded to San Paolo by this Court. San Paolo intended to pursue its claim for restitution before the trial court, after the Court of Appeal issued its Remittitur.

On July 25, 2005, the Supreme Court issued its Remittitur to the Court of Appeal. On July 27, 2005, just two days later, Simon filed a Motion to Determine if Interest is Owed by Plaintiff ("Interest Motion") with the Court of Appeal.[3] On August 11, 2005, San Paolo filed its Opposition to the Interest Motion. Among other things, San Paolo argued: (i) the Interest Motion should be summarily denied, as it was not proper for the Court of Appeal to adjudicate the factual and legal issues surrounding San Paolo's claim for restitution; (ii) San Paolo was entitled to restitution of the constitutionally excessive portion of the punitive damage award, together with interest from the date that it paid the award; (iii) San Paolo was entitled to recover interest at the legal post-judgment rate of ten percent per annum on the excess portion of the punitive damage award which it paid; and (iv), at an interest rate of ten

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[3] Simon made the true intentions behind this Motion clear when he asserted: "It is clear that neither Mr. Simon nor presumably this Appellate Court agrees that $50,000 was anywhere near the correct amount of punitive damages for San Paolo's conduct . . ." (Reply to Opposition to Motion, p. 6, n. 3.) By asking the Court of Appeal to deprive San Paolo of the interest on the money which it was compelled to pay to him, Simon sought to nullify the decision of the California Supreme Court, with which he and the Court of Appeal clearly do not agree.

percent, San Paolo was entitled to restitution in the sum of at least $925,743.27.

After additional briefing, on November 8, 2005, the Court of Appeal, whose three prior Opinions in this case were either vacated by this Court or reversed by the California Supreme Court, filed its Opinion granting Simon's Motion in its entirety and denying San Paolo any interest whatsoever on the excessive punitive damage award payment or the costs which it has incurred on appeal, including those specifically awarded by this Court.[4] In doing so, the Court of Appeal even acknowledged that Simon earned interest on the funds paid by San Paolo on the erroneous judgment.[5] (App., *infra*, A-6, n. 2, A-10, n. 4.) Still, no interest was awarded to San Paolo.

On November 22, 2005, San Paolo filed a Petition for Rehearing with the Court of Appeal, pointing out several omissions and misstatements of material facts and issues presented in connection with the Motion, which was denied

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[4] In granting San Paolo's two Writ Petitions, this Court awarded San Paolo $600.00 in costs which award was also disregarded by the Court of Appeal in its Opinion (ordering that "[e]ach party shall bear its own costs on appeal") and which remain unpaid to this day. (Declaration of Lawrence A. Abelson attached to Opposition to Interest Motion filed August 11, 2005 ["Abelson Decl."], ¶¶ 24, 30, Exhs. "E," "F"; App., *infra*, G-2, H-2.)

[5] According to statements provided by Simon, a portion of the funds paid by San Paolo were deposited into an account earning annual interest at the initial rate of 4.50%. (Motion, Exhs. "J," "L.") In his Motion, Simon did not account for earnings on almost one half of the funds paid by San Paolo, nor did he provide three years of statements for his earnings on the remainder. What he did provide demonstrates that he earned interest on the funds paid by San Paolo but refused to turn these earnings over in making restitution to San Paolo. (Reply to Opposition to Motion, Exhs. "A," "B.")

on December 1, 2005. (App., *infra*, C-1.) On December 20, 2005, San Paolo filed a Petition for Review with the California Supreme Court, presenting five issues for review relating to the propriety of the denial of any interest to San Paolo as part of its restitution following the reversal of Simon's constitutionally excessive punitive damage award. On January 25, 2006, the California Supreme Court, *en banc*, issued its Order denying the Petition for Review.

The jurisdiction of this Court in this case was established in San Paolo's two prior Petitions to this Court and confirmed by the two Orders Allowing Certiorari filed May 29, 2001, and April 21, 2003. As this Court stated in a case also involving a claim of restitution for sums paid under an inferior tribunal's order which had been subsequently reversed, "[t]here is no question as to the jurisdiction of this court on the first appeal or as to the validity of its mandate. The present controversy concerns the construction and effect to be given to the mandate." *Baltimore & Ohio R. Co. v. U.S.*, 279 U.S. 781, 784-785 (1929). "Moreover the proceeding below out of which the denial of restitution arose is incidental to and in effect a part of the main suit. . . . This appeal rests on the same foundation as did the first." *Id.* at 785. Here, San Paolo was compelled to pay the constitutionally excessive Judgment in favor of Simon after this Court issued its Order denying San Paolo's Stay Application on April 24, 2001. In addition, the instant restitution proceeding arose out of and is directly related to the main appeal challenging the punitive damage award as constitutionally excessive.

Further, as set forth *infra*, San Paolo relied upon federal authority (*Baltimore & Ohio R. Co. v. U.S.*, *supra*, 279 U.S. 781; *Gerald M. Moore & Son v. Drewry & Assocs.*, 945 F. Supp. 117 (E.D.Va. 1996); *Globe Indemnity Co. v. Puget Sound Co.*, 154 F.2d 249 (2d Cir. 1946); *U.S. v. Jaffe*, 314 F.Supp.2d 216 (S.D.N.Y. 2004)) in opposing Simon's Interest Motion and in support of its right to the recovery of interest.

(Opposition to Interest Motion at 16, 23.) The Court of Appeal also raised the federal issue of the applicability of the National Bank Act (12 U.S.C. § 91) to San Paolo's claim for Restitution in its Opinion. (App., *infra*, A-7-8.) The questions presented by San Paolo are therefore properly before this Court.

REASONS FOR GRANTING THE PETITION

A. Courts Require Guidance as to a Defendant's Constitutional Entitlement to Interest as Restitution Following the Reduction of a Punitive Damage Award Determined to be Constitutionally Excessive under *Cooper Industries* and *State Farm*.

This Petition provides this Honorable Court with the opportunity to assure the uniform, meaningful application by state and federal courts across this Nation of a party's right to restitution of all things lost as a result of having paid a judgment or order which is reversed or reduced on appeal. Specifically, the courts are in conflict as to the right of a defendant to the recovery of interest in connection with the restitution of a payment made on an award which is ultimately determined to be improper. This Court's intervention is required to clarify that the denial of interest is a taking and denial of due process where a defendant is forced to a pay an unconstitutional judgment or order issued by the court.

The reduction of a constitutionally excessive judgment requires an award of interest to avoid an unconstitutional deprivation of property. An unconstitutional taking occurs where a defendant is not compensated for interest which he is forced by a court to pay on a constitutionally excessive judgment. Such a defendant has indeed suffered an economic injury caused by public action which deserves compensation. *See Penn Central Transportation Co. v. City of New York*,

438 U.S. 104, 123-124 (1978); *U.S. v. Lynah*, 188 U.S. 445, 470 (1903) (inability to make reasonable return on property requires compensation under Fifth Amendment); *U.S. v. General Motors Corp.*, 323 U.S. 373, 377-378 (1945) ("property" as used in Taking Clause "is addressed to every sort of interest the citizen may possess").

This issue is directly related to the new, heightened standard of review recently mandated by this Court when passing on the constitutionality of an award of punitive damages. In light of recent decisions by this Court and its progeny clarifying the constitutional limits on, and requiring stricter scrutiny of, punitive damage awards, there is a substantial likelihood of the reduction of such awards on appeal and a concomitant increase in claims for restitution of the sums paid on excessive judgments, including interest thereon. Such sums can be significant (here, the amount in question exceeds $925,000.00). The courts of this Nation are in conflict, and both litigants and the courts require guidance on a defendant's right to recover interest in connection with the restitution of such sums in order to restore all property and rights lost by the erroneous judgment or order.

In the absence of any guidance from this Court following its decision in *State Farm*, the Court of Appeal denied an award of interest to San Paolo and prevented it from applying to the trial court for such an award. Decisions issued by this Court and other federal courts outside the realm of *BMW of North America v. Gore*, 517 U.S. 559 (1996) and its progeny (wherein this Court established firm constitutional limitations on excessive punitive damage awards) hold that, generally, an award of interest is an integral part of the restitution of funds paid on a reversed or reduced judgment. *See, e.g., Baltimore & Ohio R. Co. v. U.S., supra*, 279 U.S. 781; *Gerald M. Moore & Son v. Drewry & Assocs., supra*, 945 F. Supp. 117; *Globe Indemnity Co. v. Puget Sound Co., supra*, 154 F.2d 249; *Caldwell v. Puget Sound Elec. Apprenticeship and Training*

Trust, 824 F.2d 765 (9th Cir. 1987); *U.S. v. Jaffe*, *supra*, 314 F.Supp.2d 216. While this principle should be applied no differently to punitive damage awards which have been paid but are subsequently reduced as constitutionally excessive, the Court of Appeal made a contradictory conclusion, and there is no controlling federal authority on this precise issue.

The Court of Appeal's latest Opinion directly contradicts that of the California Court of Appeal, Fourth Appellate District, Division Three, in *Textron Financial Corp. v. National Union Fire Ins. Co. ("Textron")*, 118 Cal.App.4th 1061 (2004). There, after reducing a punitive damage award in light of *Cooper Industries* and *State Farm*, the Court was confronted with the very situation presented in this case. The Court properly held that "[t]o deny defendant recovery of interest on the excessive portion of the punitive damage award would be inequitable." *Textron*, *supra*, 118 Cal.App.4th at 1086. In this case, however, the Court of Appeal expressly dissented: "To the extent the [*Textron*] court may have meant that it is necessarily inequitable to deny a defendant interest on remitted punitive damages, we disagree." (App., *infra*, A-10; emphasis added.) In doing so, the Court of Appeal ignored the fact that Simon was forced to return 97% of the punitive damage award; Simon had the use of over $2,000,000 for over four years; and Simon repeatedly refused to return the money during that period. It is now necessary for this Honorable Court to grant certiorari in order to settle this conflict and provide guidance and uniformity in this critical area of the law.

After demanding payment of a judgment and/or refusing to accept an appeal bond, a plaintiff should not be permitted to avoid having to pay interest. Affording a lower court discretion to deny interest in determining a prevailing party's right to restitution, especially when that court is in disagreement with the ultimate decision, invites the potential for error and the nullification or disintegration of the decision

reversing or modifying the award.

Requiring the payment of interest at the rate on money judgments lets the judgment creditor be the author of his or her own fate. By awaiting a final decision before enforcing the judgment, he would not have to pay anything to the defendant, and he would receive interest at the legal rate on the portion of the judgment that was upheld. By electing to act aggressively and collect on the judgment, the plaintiff takes the risk that, should he lose on appeal, he will have to pay interest at the very same rate he could have charged had he withheld collection and prevailed on appeal.

Permitting the Court of Appeal's latest Opinion to stand denies San Paolo and other similarly situated parties the restitution mandated by the principles of due process. Due to their inability to post a bond on appeal or their unwillingness to do so (faced with the risk of having to pay post-judgment interest of 10% per annum -- the same risk plaintiffs should have to face), defendants who satisfy judgments and successfully assert on appeal their constitutional rights to a reduction thereof will be deprived of their property without any compensation. Such a situation effectively erodes the constitutional rights of those who are subjected to excessive punitive damage (and other) awards and denies the restitution to which they are entitled. It is patently inequitable to permit a plaintiff to escape liability for interest on funds which it has collected and must now be returned but, at the same time, charge the defendant with interest on such funds through the date of payment. Courts across the Nation, including this Court, have held that where a party is entitled to restitution of money paid pursuant to a reversed judgment, it is also entitled to interest at the rate payable on judgments. *See Baltimore & Ohio R. Co. v. United States, supra,* 279 U.S. at 786; *Globe Indemnity Co. v. Puget Sound Co., supra,* 154 F.2d at 250; *Gerald M. Moore & Son v. Drewry & Assocs., supra,* 945 F.Supp. at 122-123; *U.S. v. Jaffe, supra,*

314 F.Supp.2d at 224. The Restatement of Restitution is in accord. Rest., Restitution, § 74, com. d, pp. 307-308.

As this Court has instructed, when a judgment which has been paid is subsequently reversed, the defendant is entitled to restitution of "the amounts so paid by it together with interest thereon from the dates of such payments at the rate established by the law of the state in which such sums were paid." *Baltimore & Ohio R. Co. v. U.S.*, *supra*, 279 U.S. at 786. Similarly, the Second Circuit has determined that a court which has been reversed does not have discretion to deny the successful appellant interest on the amount paid on the erroneous judgment. *Globe Indemnity Co. v. Puget Sound Co.*, *supra*, 154 F.2d at 250. Specifically, the Court reasoned: "Had a correct judgment been entered Puget would have had the use of this sum during that period. It is just, therefore, that Puget should get interest, and the judgment on appeal will be modified accordingly." *Id.*

The Eastern District of Virginia has also determined that, where a judgment which has been satisfied is reversed, "the judgment creditor, is chargeable with interest on the sum received from the time of its receipt. This is the general rule."[6] *Gerald M. Moore & Son v. Drewry & Assocs.*, *supra*, 945 F.Supp. at 122, citing Restatement (First) of Restitution § 74 cmt. d, *Baltimore & Ohio R. Co. v. U.S.*, *supra*, and *Globe Indemnity Co. v. Puget Sound Co.*, *supra*. In both the civil and criminal contexts, restitution "is intended to return to the victim that which was wrongfully wrested from him

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[6] The Court reasoned: "Due to the erroneous judgment of June 10, 1994, Moore has had the use of this money since it was received. Had no judgment been entered against Drewry individually, he would have had the use of this sum during this time. It is just, therefore, that Drewry collect interest from the time the funds were actually received by Moore in satisfaction of the prior judgment." *Id.*

and, since he was deprived of the use and benefit of his funds, restitution should reflect that loss as well." *U.S. v. Jaffe*, 314 F.Supp.2d at 224. The Ninth Circuit has also affirmed the trial court's authority to grant restitution and recognized that "the right to recover what one has lost by the enforcement of a judgment subsequently reversed is well established." *Caldwell v. Puget Sound Elec. Apprenticeship and Training Trust, supra*, 824 F.2d at 767.

Nonetheless, the Court of Appeal disregarded this authority and determined that it had discretion to deny an award of interest in connection with the restitution of payment on a constitutionally excessive punitive damage award. Specifically, the Court of Appeal asserted: "[W]e reject San Paolo's contention that it is *entitled* to interest. And despite broad or ambiguous language in *Textron, supra,* 118 Cal.App.4th at p. 1086, we conclude that the equities disfavor an award of interest in this case, where Simon remains the prevailing party, remains entitled to punitive damages, albeit a reduced amount, and has not engaged in unreasonable or overreaching conduct in the collection of the original judgment." (App., *infra*, A-11.) Under the Court of Appeal's analysis, the fact that the judgment which is reduced includes an award of punitive damages affords the court the discretion to deny a defendant which has satisfied a judgment in full compensation for loss of use of the money which it should have never been compelled to pay.

In this case, San Paolo was compelled to pay over $2,000,000 (including post-judgment interest at the rate of 10%) to Simon on a grossly excessive, unconstitutional punitive damage award. Further, Simon earned interest on these funds. Nonetheless, the Court of Appeal determined that San Paolo was not entitled to any restitution or compensation whatsoever for the loss of the use of these

funds which Simon retained for over four years.[7] The result of this decision is to indirectly award Simon punitive damages of over $925,000 due to his retention for over four years of over $2,000,000 to which he was not entitled under the Due Process Clause of the Fourteenth Amendment – substantially more than the $50,000 in punitive damages authorized by the California Supreme Court pursuant to this Court's recent decisions.

For these reasons, this Honorable Court should grant this Petition to clarify the law of restitution following the reversal or modification of a judgment and ensure that the rights of defendants who are the object of constitutionally excessive punitive damage awards (and other erroneous judgments) are not eroded through the denial of interest on funds which they should never have been required to pay.

B. It Must Be Clarified that the Victims of Constitutionally Excessive Punitive Damage Awards are Entitled to Interest from the Date Such Awards are Paid.

Plaintiffs such as Simon who obtain payment on excessive punitive damage awards should be required to pay interest on the amount overpaid at their state's legal rate. The general principle requiring the restitution of funds paid under a judgment subsequently determined to be erroneous is well

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[7] At a minimum, San Paolo should have been awarded all of Simon's earnings on the excessive portion of the punitive damage award. *Stockton Theatres, Inc. v. Palermo*, 121 Cal.App.2d 616, 619- 620 (1953) (party receiving money "'under an erroneous judgment, thereafter reversed, should be required to restore what he has received . . . Restitution must be made of all that was received under the erroneous judgment . . .'")

established.[8] The courts, however, disagree on whether, to achieve this goal, restitution must necessarily include the payment of interest on what is lost by virtue of having satisfied the erroneous judgment, especially in the context of punitive damages.

Under the doctrine of restitution, defendants such as San Paolo should be entitled to recover interest from the date of payment on the portion of the punitive damage award that is constitutionally excessive in order to place them in the position they would have occupied but for the excessive award, and to restore to them "all the things lost" by reason of its coerced payment of that award. While the principles guiding the restitution analysis, including remedying the plaintiff's unjust enrichment caused by an improper award, seemingly require that the recipient of such funds pay interest thereon[9], as reflected by the Court of Appeal's Opinion, no

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[8] For example, under California law, it is clear that "[w]here a judgment or decree of an inferior court is reversed by a final judgment on appeal, a party is in general entitled to restitution of all the things lost by reason of the judgment in the lower court; and, accordingly, the courts will, where justice requires it, place him as nearly as may be in the condition in which he stood previously . . ." *Ward v. Sherman*, 155 Cal. 287, 291 (1909); internal citations omitted; emphasis added; *see also Arden Group, Inc. v. Burk*, 45 Cal.App. 4th 1409, 1416 (1996) (appellants entitled to damages from enforcement of the judgment pending appeal "in the amount necessary and appropriate to restore [the appellants] to the position they were in prior to enforcement of the judgment"); *Levy v. Drew*, 4 Cal.2d 456, 459 (1935); *Cowdery v. London & San Francisco Bank*, 139 Cal. 298, 302, 305 (1903).

[9] *See* Rest., Restitution, §74, com. d, pp. 307-308, emphasis added ("upon reversal of a judgment the payer is entitled to receive from the creditor the amount thus paid *with interest*"); *Schubert v. Bates*, 30 Cal.2d 785, 790-791 (1947) (approving and applying

such rule has been clearly established.

Recently, in light of *Cooper Industries* and *State Farm*, the California Court of Appeal, Fourth Appellate District, Division Three, held that a $1,700,000.00 punitive damage award was constitutionally excessive in comparison with the compensatory damage award of $165,414.40 and reduced it to $360,000.00. *Textron, supra,* 118 Cal.App.4th at 1085.[10] After reducing the judgment, the Court of Appeal was confronted with the same situation presented in this case:

> Defendant claims that, on June 8, 2001, subsequent to the finality of our original judgment, it paid the

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section 74 of the Restatement of the Law of Restitution); *Stockman v. Riverside Land & Irrigating Co.*, 64 Cal. 57, 59 (1883) (upon reversal of judgment, "it is but right that the amount of costs so received . . . with legal interest from the date of the receipt, be returned to respondent, to the end that the status quo be restored"); *Baltimore & Ohio R. Co. v. U.S., supra*, 279 U.S. at 786 (providing that upon reversal of judgment, judgment debtor is entitled to restitution of payments made pursuant to the judgment "together with interest thereon from the dates of such payments at the rate established by the law of the State in which such sums were paid"); *Globe Indemnity Co. v. Puget Sound Co., supra*, 154 F.2d at 250 (holding court abused discretion in failing to award interest in accordance with the "general rule" of comment d of Restatement of Restitution section 74); Cal. Code Civ. Proc., § 701.680(b) (providing that where a judgment is reversed, the judgment debtor may recover the proceeds of an execution sale "with interest at the rate on money judgments").

[10] Like the Supreme Court decision in this case, in *Textron*, a punitive damage award was held unconstitutional following remand by the United States Supreme Court with instructions to reconsider the award in light of *State Farm Mut. Auto. Ins. Co. v. Campbell, supra*, 538 U.S. 408.

> outstanding judgment when plaintiff threatened to execute on it. Citing Code of Civil Procedure section 908, defendant argues it is entitled to not only recover the constitutionally excessive portion of the punitive damage award, but interest on it from the date of payment. Plaintiff opposes the payment of interest contending it is inequitable and 'would only add insult to injury.' *Id.*

In *Textron*, the Plaintiff argued that, in light of its litigation expenses and "defendant's fraudulent conduct underlying this litigation," it would be inequitable to award interest. The Court concluded, however, that "[n]either claim supports denying restitution to defendant." *Textron, supra,* at 118 Cal.App.4th at 1086. In rejecting the plaintiff's unclean hands defense and agreeing that the defendant was entitled to interest on the amount the Plaintiff was obligated to pay as restitution, the Court of Appeal in *Textron* explained:

> The misconduct that brings the unclean hands doctrine into play must relate directly to the cause at issue. Past improper conduct or prior misconduct that only indirectly affects the problem before the court does not suffice. The determination of the unclean hands defense cannot be distorted into a proceeding to try the general morals of the **parties. . . . Defendant's fraudulent conduct occurred in the events leading to this litigation.** There is no indication it engaged in inequitable conduct in the postjudgment proceedings. **Defendant paid the judgment apparently when plaintiff threatened to execute on it. Had plaintiff chosen to await termination of the proceedings in the United States Supreme Court before seeking recovery, it would be entitled to interest on the**

> **sum finally awarded. To deny defendant recovery of interest on the excessive portion of the punitive damage award would be inequitable.** *Id.*; emphasis added.

In denying any interest to San Paolo, the Court of Appeal stated that it "disagree[d]" with the *Textron* decision. (App., *infra*, A-10.)

The status quo can be restored only through the payment of legal interest on the funds improperly collected. This principal is especially true when a punitive damage award which violates a defendant's rights under the Fourteenth Amendment is paid and later reduced. There is a clear conflict in the courts on this vital and timely issue, which necessitates this Court's intervention.

C. Courts Require Guidance on the Amount of Interest to be Awarded on the Excessive Portion of the Punitive Damage Award Which Has Been Paid.

Defendants such as San Paolo who pay constitutionally excessive punitive damage awards should be entitled to interest on the overpayment according to the statutory interest rate on civil judgments imposed by their respective states. Here, that rate is ten percent, and application thereof results in additional restitution in the sum of $925,743.27. This figure represents interest at ten percent on the excess portion of the punitive damage award from May 7, 2001 (the date of payment) through July 20, 2005 (when the money was returned).

Defendants who have been compelled to pay judgments which are subsequently reversed or reduced need a bright-line rule and certainty when seeking restitution. The only reasonable figure is the same as the rate which accrues on judgments, which in this case is ten percent. Cal. Code Civ.

Proc., § 685.010(a). That is the rate of interest that San Paolo had to pay to Simon on the portion of the judgment which was affirmed. It would be inequitable if Simon were permitted to pay a lower rate of interest on the portion of the judgment he had to return, particularly since he could have avoided paying any interest to San Paolo and would have received ten percent interest on the amount finally awarded if he had simply waited until San Paolo's appeal was fully resolved before demanding payment. *See Textron, supra*, 118 Cal.App.4th at 1086.

Defendants are forced to pay interest on judgments at a certain fixed rate (here, ten percent) even though they might be earning far less on the money. Plaintiffs should also be required to pay the same rate. Moreover, the application of this rate to a reversed judgment makes perfect sense given the inherent similarity between post-judgment interest and interest on a reversed judgment.[11]

Denying San Paolo the right to interest ignores the benefit enjoyed by Simon and lost by San Paolo during the over four years during which he had the use of San Paolo's money, which is likely much greater. Because litigating parties would never agree on rates of return on capital (or any other measure of the benefits enjoyed by the use of another party's money), states have fixed the rates which accrue on judgments, thereby precluding a case-by-case determination of the appropriate rate to be applied to a judgment. The same analysis applies here.

Courts in other jurisdictions consistently have held that, where a party is entitled to restitution of money paid pursuant to a reversed judgment, it is also entitled to interest at the rate

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[11] In California, for example, the ten percent interest rate on judgments is equally applied to the proceeds of an execution sale that must be returned following the reversal of a judgment. Cal. Code Civ. Proc., §§ 685.010, 701.680(b).

payable on judgments. *See Baltimore & Ohio R. Co., supra,* 279 U.S. at 786 (judgment debtor entitled to restitution of payments made pursuant to reversed judgment "together with interest thereon from the dates of such payments at the rate established by the law of the State in which such sums were paid"); *Gerald M. Moore & Son v. Drewry & Assocs., supra,* 945 F.Supp. at 123 ("This court finds that Drewry is entitled to restitution of the above sums . . . plus interest at the applicable post-judgment rate of interest from the dates these monies were received by Moore"); *U.S. v. Jaffe, supra,* 314 F.Supp.2d at 224 ("Restitution . . . is intended to return to the victim that which was wrongfully wrested from him and, since he was deprived of the use and benefit of his funds, restitution should reflect that loss as well. Accordingly, the statutory interest rate used for civil judgments in both federal and state courts in this district provides a more suitable remedial base . . .")

Puzzlingly, in approaching this question, the Court of Appeal adopts Simon's concept of *pre-judgment* interest. (App., *infra,* A-8-9, 11.) Not matter how it is approached, however, the interest on the overpayment, just like the interest on the Judgment itself, accrued on a *post-judgment* basis. The Court of Appeal's comments about the inability of Simon to calculate the amount which would have to be restored to San Paolo is not only irrelevant but without merit. Simon could have approached it from a conservative perspective and accepted the new Appeal Bond.[12] Instead, Simon "rolled the dice," defiantly argued that he was entitled to the entire award, compelled San Paolo to pay the Judgment, and lost.

The fact that Simon could not foresee the actual results in

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[12] Another number Simon could have considered was the $250,000.00 reduction of the first verdict which he refused to accept and gambled away in an effort to satisfy his greed for millions from San Paolo.

this case does not defeat San Paolo's right to compensation for the loss of use of its own money. In every case where a judgment is reversed or reduced, the plaintiff can make the argument that he could not have guessed that it would happen and thereby avoid payment of interest. Further, on two separate occasions, this Court reversed the decisions of the Court of Appeal affirming the punitive damage award. At a minimum, this should have been a sign that the award would ultimately be reduced. Simon, however, remained defiant.

D. In the Alternative, San Paolo Requests a Peremptory Order for an Award of Interest.

As an alternative, San Paolo requests that this Court grant this Petition, vacate the Opinion of the Court of Appeal, and remand with instructions to award San Paolo interest at the legal rate of ten percent per annum on the overpayment amount of $2,156,304.31 from May 7, 2001, through July 20, 2005, plus all costs awarded by this Court.

On May 7, 2001, San Paolo paid the entire amount due on the Judgment, including the $1.7 million punitive damage award, plus interest at ten percent (the statutory rate of interest on judgments) from April 8, 1998, the date the Judgment was entered, through May 2, 2001,[13] for a total payment of $2,232,194.12. (Abelson Decl., ¶ 19.) Because the punitive damage award was reduced to $50,000, San Paolo is entitled to restitution in the minimum amount of $925,743.27 from Simon, as follows:

Compensatory Damages:	$5,000.00
Punitive Damages:	$50,000.00

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[13] The parties agreed that interest would cease to accrue as of May 2, 2001, the date that San Paolo was prepared to tender payment of the Judgment.

Costs:	$18,374.80
Total Judgment Principal:	**$73,374.80**
Plus Interest ($73,374.80 x 0.10 x 3-25/365 [3 years, 25 days from April 8, 1998 to May 2, 2001]):	$22,515.01
Less Atha Settlement Credit:	($20,000.00)[14]
Max. Amount Due as of 5/2/01:	**$75,889.81**
Difference between Amount Paid and Amount Due on Judgment as of 5/2/01 ($2,232,194.12 - 75,889.81):	$2,156,304.31
Interest on Overpayment ($2,156,304.31 x 0.10 x 4-106/365 [4 years, 106 days from 5/7/01 {date of payment} through 7/20/05 {date of repayment}]):	$925,143.16
Costs awarded by this Court ($300.00 on 6/28/01, plus $300.00 on 3/21/03):	$600.00
Less: Payment by Simon:	($2,156,304.20)
Min. Restitution Due to San Paolo:	**$925,743.27**

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[14] This amount was paid by San Paolo some time in late 1998 or early 1999. As a result, the principal amount of the Judgment should have been reduced as of that time (less than one year from the entry of Judgment), with interest being assessed against this lower amount, not the entire amount of the Judgment, as if this money had never been paid. In any event, for purposes of responding to the Interest Motion, San Paolo calculated interest on the entire amount of the Judgment through the date of payment, without any adjustment for this payment.

CONCLUSION

For legal, equitable and procedural reasons, certiorari should be granted. The Courts of Appeal and litigants of this Nation desperately need guidance from this Honorable Court on the right to interest when awarding restitution in connection with remitted punitive damage awards. The decision of the Court of Appeal eviscerates the goal of restitution, which is to restore to the victim of an excessive judgment all rights lost as a result of the payment thereof. In light of the fact that an excessive punitive damage award violates a defendant's constitutional rights, an award of interest on the amount overpaid in furtherance of this violation is a necessity. For these reasons, it is respectfully requested that this Petition for Writ of Certiorari be granted. As an alternative, it is requested that this Court vacate the Opinion of the Court of Appeal and remand with instructions to award San Paolo interest at the legal rate of ten percent per annum on the overpayment amount, plus all costs awarded by this Court.

Date: April 21, 2006

Respectfully submitted,

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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

(California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.)

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA,
SECOND APPELLATE DISTRICT
DIVISION 4

COURT OF APPEAL- SECOND DIST.
FILED
NOV - 8 2005
JOSEPH A. LANE Clerk
Deputy Clerk

LIONEL SIMON,
Plaintiff and Appellant,
v.
SAN PAOLO U.S. HOLDING COMPANY, INC.,
Defendant and Appellant.

No. B121917
(Los Angeles County Super. Ct. No. BC152431)

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard P. Kalustian, Judge. Modified, affirmed and granted.

Knapp, Petersen & Clarke, Andre E. Jardini and Mitchell B. Ludwig for Plaintiff and Appellant.

Epport, Richman & Robbins, Steven N. Richman and Lawrence A. Abelson for Defendant and Appellant.

BACKGROUND

This case has a long history. On April 8, 1998, after a second jury trial on the issue of punitive damages, judgment was entered against the defendant, San Paolo Holding Company, in favor of the plaintiff, Lionel Simon, in the amount of $1,705,000. The judgment amount consisted of $5,000 in compensatory damages and $1,700,000 in punitive damages. On August 28, 2000, we affirmed the superior court judgment. The California Supreme Court denied review. The United States Supreme Court granted certiorari, vacated our opinion, and remanded for further consideration in light of *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* (2001) 532 U.S. 424. (*San Paolo U.S. Holding Co., Inc. v. Simon* (2001) 532 U.S. 1050.)

On November 7, 2001, we again affirmed the judgment, and the California Supreme Court denied review, but the United States Supreme Court again granted certiorari and vacated our second opinion, remanding for further consideration in light of *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408. (*San Paolo U.S. Holding Co., Inc. v. Simon* (2003) 538 U.S. 974.)

On December 2, 2003, we again affirmed the judgment. This time, the California Supreme Court granted review and reversed our judgment on June 16, 2005, in *Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159. The Court remanded with directions to modify the superior court

judgment to reduce the award of punitive damages to $50,000, and to affirm the judgment as modified. It is now before us to enter the modified judgment and to consider a motion brought by Simon pursuant to Code of Civil Procedure section 908.

Early in the appellate process, San Paolo obtained a stay of execution by posting an appeal bond, and later, a stay was granted by the United States Supreme Court. In early May 2001, after the stay was vacated and the bond had expired, San Paolo paid the original judgment, which was $2,228,889 by that time, but it did so in exchange for Simon's agreement to two conditions. Simon was to provide proof of deposit of approximately one-half the judgment amount into an insured financial institution, and he was not to transfer or dissipate the funds until the appeals were resolved and the judgment was final. There was no agreement with regard to the payment of interest on the deposited funds.

Simon complied with the conditions, but on July 3, 2001, San Paolo demanded the return of its payment, plus 10 percent interest computed from the time of payment, in exchange for posting a bond in the same amount it had previously posted. Simon refused, and sent counsel a copy of a bank statement, showing a beginning balance of $1,134,084 in Washington Mutual Bank.

On July 5, 2005, Simon tendered to San Paolo's attorneys a check in the sum of $2,156,304.20, representing restitution of the excess punitive damages, interest on the excess which had accrued to the date of payment, less the amount of Simon's reduced judgment, with costs and interest, minus an agreed credit. San Paolo rejected the tender, returned the check, demanding interest at the rate of 10 percent per annum from the time of the payment in 2001.

On July 19, 2005, Simon retendered the check, agreeing that San Paolo could negotiate it without waiving any claim it might make to interest, providing also that Simon would retain all rights with regard to the amount and circumstances of the restitution payment. San Paolo accepted the second tender on such conditions.

Simon has now filed a motion seeking a restitution order under Code of Civil Procedure section 908, including a declaration that San Paolo may not recover interest on amounts it paid to Simon on account of the original punitive damage award in excess of $50,000.

DISCUSSION

Code of Civil Procedure, section 908 provides: "When the judgment or order is reversed or modified, the reviewing court may direct that the parties be returned so far as possible to the positions they occupied before the enforcement of or execution on the judgment or order. In doing so, the reviewing court may order restitution on reasonable terms and conditions of all property and rights lost by the erroneous judgment or order, so far as such restitution is consistent with rights of third parties and may direct the entry of a money judgment sufficient to compensate for property or rights not restored. The reviewing court may take evidence and make findings concerning such matters or may, by order, refer such matters to the trial court for determination."

When ordering restitution after a punitive damage award is reduced, a court may, in its discretion, include interest when it is equitable to do so. (*Textron Financial Corp. v. National Union Fire Ins. Co.* (2004) 118 Cal.App.4th 1061, 1085-1086 (*Textron*).)

San Paolo contends that we have no authority to consider the motion, because, it asserts, the California Supreme Court, not this court, is the "reviewing court." In the alternative, San Paolo asks that if we decide the issue, we award it additional interest at the rate of 10 percent per annum from the time of the 2001 deposit, which would amount to more than $925,000.

San Paolo proffers no authority for its assertion that this court is not the reviewing court. A reviewing court is one with appellate jurisdiction, and may be the appellate department of a superior court, the Court of Appeal, or the Supreme Court. (See *Leone v. Medical Bd. of Cal.* (2000) 22 Cal.4th 660, 666.) The statute permits the reviewing court, upon reversal *or modification*, to order restitution on reasonable terms and conditions, and to take evidence and make findings. (Code Civ. Proc., § 908.) The Supreme Court did not do so upon reversal, and there is no language in the statute indicating any legislative intent to limit this reviewing court from doing so upon modifying the judgment.

San Paolo also contends that we should decline to consider Simon's motion, leaving it instead to the trial court, because it requires a factual determination.

Under the plain language of the statute, the taking of evidence is a matter of discretion with the reviewing court. (Code Civ. Proc., § 908.) Of course, an appellate court may refer the matter to the trial court in appropriate cases, such as those that "would involve the taking of an account and the trial of many issues of fact which would be raised during the course of such accounting." (*Stockton Theatres, Inc. v.*

Palermo (1953) 121 Cal.App.2d 616, 624.)[1]

In another context, it has been observed that when the facts are presented in declarations, rather than live testimony, the appellate court is in a no worse position than the trial court to evaluate them. (See *United Farm Workers National Union v. International Brotherhood of Teamsters* (1978) 87 Cal.App.3d 225, 233.) There has been no suggestion here that live testimony is necessary, and there are few factual issues to consider. The evidence consists primarily of the attorneys' letters to one another, and there is no claim that they are not authentic or that they present material conflicts.[2]

The purpose of the appellate court's power to make a final determination of the rights of the parties by modifying and affirming the judgment is to avoid subjecting the parties to any further delay or expense. (*Sagadin v. Ripper* (1985) 175 Cal.App.3d 1141, 1170.) The appellate court's express statutory authority under section 908 to determine restitution and the conditions of restitution serves this purpose by disposing the matter without further proceedings in the trial

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[1] In its Objection and Response to Reply etc., San Paolo suggests that an accounting is necessary to show that Simon did not keep the funds in a financial institution as agreed, that Simon used the funds for his purposes, and that he did not earn as much interest on the funds as he could have. But San Paolo also concedes that Simon's use of any of the funds is irrelevant to the motion.

[2] Simon's motion is supported by two declarations, his attorney's and his own. San Paolo objects to portions of Simon's own declaration, which is largely argumentative and irrelevant. We therefore sustain San Paolo's objection on those grounds, except its objection to Simon's statement in paragraph No. 7 that he never used the money, and kept it at all times in a savings account as required by San Paolo, and to his statement in paragraph No. 8 that the funds earned interest at an average rate of 1.938 percent. With regard to those two statements, the objection is overruled.

court, which might then result in another appeal. (See Code Civ. Proc., § 909.)

Our discretion should be exercised so that the parties are "returned so far as possible to the positions they occupied before the enforcement of or execution on the judgment...." (Code Civ. Proc., § 908.) Satisfying San Paolo's demand would leave it with a judgment of nearly one million dollars, clearly not its position prior to the satisfaction of the judgment.

San Paolo suggests that it would be inequitable if it were not compensated for the loss of use of its money when it paid the judgment only because Simon threatened to execute on the judgment. (See, e.g., *Textron, supra,* 118 Cal.App.4th at p. 1086.)

When this motion reached us, we asked the parties to provide letter briefs informing the court whether San Paolo was entitled to the protection of 12 United States Code section 91 ("section 91"), which provides in relevant part that "no attachment, injunction, or execution, shall be issued against [a national banking] association or its property before final judgment in any suit, action, or proceeding, in any State, county, or municipal court." As a foreign bank, San Paolo Bank is not a national bank, but if it is licensed by the United States Comptroller of the Currency, it is entitled to the same privileges as a national bank. (12 U.S.C. § 3102(b); see generally, *U.S. v. Lewis* (9th Cir.1995) 67 F.3d 225, 230-231 [statute provides foreign banks with "national treatment"].)

Section 91 prohibits the "seizure of the property of a national bank before a judgment against that institution ha[s] completed the appellate process." (*U.S. v. Lemaire* (5th Cir.1987) 826 F.2d 387, 390, cert. den. (1988) 485 U.S. 960.)

Thus, no writ of execution shall issue nor abstract recorded in aid of execution of a money judgment against a national bank. (*United States v. F.D.I.C.* (5th Cir.1989) 881 F.2d 207, 209-210, cert. den. (1990) 493 U.S. 1072.) Similarly, a national bank is not required to post a bond to stay execution. (See *In re Richmond Produce Co., Inc.* (N .D.Cal.1996) 195 B.R. 455.)

If San Paolo was entitled to the benefits of section 91, its payment of the judgment may have been voluntary and unnecessary, apparently done for the purpose of eliminating the risk of owing Simon interest upon nearly $2 million at the rate of 10 percent per annum calculated over several years. Costs made unnecessary by 12 United States Code section 91 may not be recoverable. (See *Jewell v. Bank of America* (1990) 220 Cal.App.3d 934, 938, 940-941 [bond costs recoverable only because they were incurred prior to construction of section 91 by *U.S. v. Lemaire, supra*, 826 F.2d 387, as prohibiting execution].)

Unfortunately, the further briefing on the issue was not dispositive. We thus turn to whether it would be equitable to allow an award of interest to San Paolo.

As Simon points out, he obtained a judgment for punitive damages in the sum of $1,700,000, and during the ensuing seven years involving four appellate proceedings, there was never any certainty about how much, if any, would have to be restored. Thus, any award of interest to San Paolo is best compared to prejudgment interest.[3]

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[3] The 10 percent San Paolo demanded is the amount that accrues upon judgments. (See Code Civ. Proc., § 685.010.) Otherwise, the maximum permissible interest rate is seven percent. (Cal. Const., art. XV, § 1.)

Prejudgment interest may be recovered from a tortfeasor from the date when the damages are readily ascertainable. (*Levy-Zentner Co. v. Southern Pac. Transportation Co.* (1977) 74 Cal.App.3d 762, 798; Civ.Code, § 3287.) It is not allowable when the amount of the damages is not readily ascertainable, but must be resolved by accord, verdict, or judgment. (*Lineman v. Schmid* (1948) 32 Cal.2d 204, 209.) Prejudgment interest is in the nature of damages. (*Id.* at p. 212.) It is meant to compensate the *tort* "plaintiff for the loss of *calculable* funds that belonged to the plaintiff, or should have been paid to the plaintiff. [Citations.]" (*Steinfeld v. Foote-Goldman Proctologic Medical Group, Inc.* (1997) 60 Cal.App.4th 13, 21, italics added.)

San Paolo attempts to paint Simon with the same brush as tortfeasors upon whom prejudgment interest may be imposed. It contends that it had to pay the judgment, because Simon refused to accept a bond. San Paolo's own evidence in opposition to the motion casts doubt on this contention. In its letter dated July 3, 2001, to opposing counsel, it agreed to post a bond in the same amount as previous bonds, but only in exchange for the return of the judgment amount paid by San Paolo *plus 10 percent interest* from the date of payment.

San Paolo also suggests that Simon *wrongfully* refused to make restitution upon reversal of the judgment. But when Simon attempted to make restitution, San Paolo rejected the tender, returned the check, and demanded interest, again at the rate of 10 percent per annum. It appears that Simon's "refusal" to restore the excess over the reduced judgment was a refusal to accede to San Paolo's demand for interest, without which the parties might have agreed upon a bond.

Relying on *Textron, supra*, 118 Cal.App.4th at pp. 1085-1086, San Paolo contends that it is *entitled* to interest.

There was no such holding in *Textron*, which was, as we read it, an observation that denying interest would be inequitable if based *solely* upon consideration of the defendant's conduct that gave rise to liability. (*Ibid.*) We have no quarrel with that observation. To the extent the court may have meant that it is necessarily inequitable to deny a defendant interest on remitted punitive damages, we disagree.[4]

A restitution order under Code of Civil Procedure section 908 must return the parties so far as possible to the positions they occupied before the enforcement of or execution on the judgment or order. San Paolo may have lost the use of the money, but it has not shown what it might have earned in the market. Further, San Paolo's claimed inability to post a bond was due only to its own insistence upon the condition of payment by Simon of interest. And payment benefited San Paolo by eliminating the risk it may have had to pay interest for a number of years.

As additional direct authority for its demand for interest at 10 percent, San Paolo cites Code of Civil Procedure section 701.680, subdivision (b), which provides: "If the judgment is reversed, vacated, or otherwise set aside, the judgment debtor may recover from the judgment creditor the proceeds of a sale pursuant to the judgment with interest at the rate on money judgments to the extent the proceeds were applied to the satisfaction of the judgment." This section provides for restitution when a judgment debtor's property has been sold at an execution sale, and cannot, therefore, be returned. No

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[4] There is no suggestion in *Textron* that 10 percent would be an appropriate rate, should interest be allowed. Here, the interest actually earned on the deposit was less than two percent, and the maximum legal rate on a debt not reduced to judgment is seven percent. (See Cal. Const., art. XV, § 1; Code Civ. Proc., § 685.010.)

property has been seized under a writ of execution or sold in this case. San Paolo's proffered authority is inapplicable.

Thus, we reject San Paolo's contention that it is *entitled* to interest. And despite broad or ambiguous language in *Textron, supra*, 118 Cal.App.4th at p. 1086, we conclude that the equities disfavor an award of interest in this case, where Simon remains the prevailing party, remains entitled to punitive damages, albeit a reduced amount, and has not engaged in unreasonable or overreaching conduct in the collection of the original judgment.

Without such circumstances, the comparison to prejudgment interest is the most apt here. Such interest is in the nature of damages. (*Lineman v. Schmid, supra*, 32 Cal.2d at p. 209.) No salutary purpose would be served by imposing interest as *damages* upon Simon, the injured plaintiff in this action, particularly upon an uncertain sum on which *Simon* would not have been able to recover prejudgment interest, since prejudgment interest is not allowed on punitive damages. (*Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 662, 664.)

Nor would Simon have been able to recover prejudgment interest on compensatory damages, unless such damages were subject to calculation. (See *Steinfeld v. Foote-Goldman Proctologic Medical Group, Inc., supra*, 60 Cal.App.4th at p. 21.) Here, the amount to be restored was not calculable prior to the reversal by the California Supreme Court, and once it was calculable, Simon tendered it prior to the court's issuance of the remittitur on July 21, 2005.

We conclude that so far as possible, Simon's tender of July 15, 2005, in the amount of $2,156,304, returned the parties to the positions they occupied before San Paolo's payment of the

judgment. (Code Civ. Proc., § 908.) We shall therefore grant Simon's motion and declare that San Paolo is not entitled to recover interest on restored funds.

DISPOSITION

The portion of the superior court judgment awarding plaintiff punitive damages is modified to reduce the award to $50,000. As so modified, the judgment is affirmed. Simon's motion pursuant to Code of Civil Procedure section 908 is granted. Simon's obligation to restore excessive punitive damages to San Paolo has been satisfied. No additional amount is owing. Each party shall bear its own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

HASTINGS, J.

We concur:

EPSTEIN, P.J.

CURRY, J.

IN THE SUPREME COURT OF CALIFORNIA

S121933

SUPREME COURT
FILED
JUN 16 2005
Frederick K. Ohlrich Clerk

DEPUTY

LIONEL SIMON,
Plaintiff and Appellant,
v.
SAN PAOLO U.S. HOLDING COMPANY, INC.,
Defendant and Appellant.

Ct.App. 2/4 B121917
Los Angeles County Super. Ct. No. BC15243

In an action arising from plaintiff's failed attempt to purchase an office building from defendant, the jury found that the parties had no binding and enforceable agreement but that defendant had committed promissory fraud. On his fraud cause of action, plaintiff was awarded $5,000 in economic compensatory damages and $1.7 million in punitive damages. Considering all the relevant circumstances, we conclude this award of punitive damages exceeds the federal due process limitations outlined in recent United States Supreme Court decisions. We further conclude the maximum award constitutionally permissible in the circumstances of this case is $50,000.

The central issue presented is whether, in addition to the $5,000 in compensatory damages awarded, the punitive damages award should be measured against the $400,000 in profit plaintiff claims he would have achieved had defendant sold the property to him at the agreed price. Plaintiff argues this amount represents either the uncompensated harm he suffered from defendant's conduct or the potential harm that conduct could have caused him. On this issue, we conclude that while uncompensated or potential harm may in some circumstances be properly considered in assessing the constitutionality of a punitive damages award, here defendant's fraud neither caused nor foreseeably threatened to cause $400,000 in harm to plaintiff. Under these circumstances, the $1.7 million punitive damages award must be measured against the $5,000 compensatory award, and so measured it is grossly excessive.

Our decision here addresses only the federal constitutional question, not any issue of excessiveness under California law.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Lionel Simon owns and operates a paper supply company, Liberty Paper Company, located in Los Angeles. In 1996, when the events that gave rise to this lawsuit occurred, Simon was leasing premises for his business; he had never before purchased a commercial building.

Defendant San Paolo U.S. Holding Company, Inc. (San Paolo Holding), is a wholly owned subsidiary of an Italian bank, Instituto Bancario San Paolo, S.p.A. (San Paolo Bank). In the mid-1990's, San Paolo Holding acquired and disposed of the nonperforming loans and real property of First Los Angeles Bank, a bank San Paolo Bank sold in 1995. At the end of 1996, San Paolo Holding had net assets worth around

$46 million. Pursuant to a plan of liquidation, however, most of this wealth was transferred in cash to the parent corporation, and by 1998, when punitive damages were tried in this case, San Paolo Holding held only about $4.8 million in net assets.

Duane King, who represented San Paolo Holding in the failed negotiations with Simon, was a vice-president in charge of disposing of the properties acquired from First Los Angeles Bank. William Schack, a first vice-president of San Paolo Holding, supervised King.

In 1994, Simon noticed that a small downtown office building at 816 South Figueroa Street was for sale. He considered it perfect for his business needs and remained interested in buying it after San Paolo Holding acquired it through foreclosure in late 1995. In March 1996, Simon learned that an arrangement to sell the building to an investment group headed by Robert DeVogelaere for $1.5 million had fallen though; Simon then asked William Atha, the real estate broker handling the property for San Paolo Holding, to present Simon's offer to buy the building for $1.2 million. In ensuing negotiations, King twice raised the asking price after obtaining Simon's oral agreement to buy, and no written agreement was reached. Additional negotiations in April and May collapsed in disputes over price (King wanted $1.35 million) and closing date (King wanted to close by the end of June for internal bookkeeping reasons, while Simon wanted a long escrow in case the foreclosed prior owner exercised its right of redemption).

The parties finally reached a tentative written agreement in June 1996. On June 12, King and Simon executed a letter of intent drafted by Atha, the broker. In exchange for San Paolo Holding's acceptance of a $1.1 million sale price, Simon

promised his cooperation in closing the transaction by June 27. Escrow was to open by 5:00 p.m. the next day, June 13, upon the approval of San Paolo Bank's Los Angeles and New York offices. Simon was to deposit $50,000 to open escrow and was to complete all inspections and due diligence and secure financing by June 26, at which time his deposit would be released to the seller. The parties agreed "to exclusively negotiate upon execution of this letter" and "to proceed to escrow and attempt to complete a transaction based upon the above conditions," which were said to constitute the "essential elements" of the transaction. Simon added a handwritten addendum stating, "This letter is intended as a letter of intent only and this transaction is subject to approval by legal counsel of the deposit receipt and escrow instructions." (Simon retained counsel on June 12, paying a nonrefundable $5,000 retainer.) On the facsimile cover sheet transmitting the executed letter to Simon, Atha described it as a "signed letter of intent (nonbinding)."

On the morning of June 13, Atha asked Simon if he could have his inspections done by June 21, instead of June 26 as agreed. Simon replied that he also was anxious to complete the purchase and would try to have the inspections done by June 21. Later, Atha called to tell him that San Paolo Holding was now insisting on completion by June 21. Simon said he would agree to finish by June 24, a Monday, and to use his best efforts to do so by June 21, the previous Friday. Atha drafted a deposit receipt reflecting that schedule, but King did not sign it. Despite Atha's pointing out to both sides that they were only one business day apart in their positions, no further agreement was reached and escrow did not open as planned on June 13. Around 5:00 p.m. on June 13, King faxed a letter to Simon, giving notice that San Paolo Holding "has failed to come to terms with you" and "[a]ccordingly, we are terminating negotiations with you and plan to move on in our

efforts to market the building."

Schack, King's supervisor in Los Angeles, testified that he and King wanted to sell the building at 816 South Figueroa Street in the quarter ending June 30, 1996, in order to maximize the department's bonus and show bank headquarters that the Los Angeles office was selling assets. According to Schack, after King signed the letter of intent specifying June 26 as the buyer's date to complete inspections and release his deposit, King and Schack instead decided that "the 21st was what would work for us." Although King told Schack that Simon had agreed to complete by June 24, King and Schack did not seek approval from the New York office for any date other than June 21. Because Simon would not agree to June 21, "the transaction was cancelled."

King agreed with Schack that the "big issue" causing failure of the sale to Simon was the date for completion of inspections and release of Simon's deposit. King also suggested that escrow could not be opened on June 13 because Simon did not submit the financial statements necessary for him to obtain financing from San Paolo Bank. Atha, however, testified that King told him San Paolo Holding would not accept Simon's deposit or financials because of the disagreement over the release date; Atha in turn told Simon not to bother tendering the deposit and submitting the financials.

On June 14, 1996, San Paolo Holding reached a written agreement to sell the building for $1 million to a group that included DeVogelaere, the investor with whom King had negotiated earlier in the year. At trial, the parties vigorously disputed whether King began the negotiations that led to this agreement during the period between executing the letter of intent with Simon on June 12 and terminating negotiations

with him at 5:00 p.m. on June 13.

While King and DeVogelaere, in declarations submitted for the purpose of expunging a lis pendens Simon had filed in connection with this lawsuit, stated they had conducted no negotiations until after the negotiations with Simon were terminated, there was considerable evidence to the contrary: phone records showed numerous calls between King and DeVogelaere during the day on June 13, in which, DeVogelaere testified, they discussed his group's offer to buy the building; according to notes that Atha took before a call to Simon at 3:30 p.m. on June 13, and according as well to King's own testimony, King told Atha that afternoon not to tell Simon that King was talking to another possible buyer; the sale contract originally bore dates of June 12 and June 13, later overwritten to read June 14; the offer sheet was also dated June 13; and Schack faxed the offer sheet and a credit memorandum to the New York office at 9:15 a.m. on June 14, casting doubt on King's testimony that starting around 8:00 a.m. on the morning of June 14 he signed the contract at his Malibu home, took the executed contract to DeVogelaere's home in Pacific Palisades, drove to his downtown Los Angeles office (a trip DeVogelaere testified ordinarily took at least 45 minutes), and prepared the offer sheet and detailed credit memorandum.

Even after opening escrow with the DeVogelaere group, King had Atha, as yet unaware of the DeVogelaere contract, engage in renewed negotiations with Simon, orally offering on June 17 to accept a June 26 deposit release date and to pay $5,000 to help with Simon's due diligence. Simon instead filed this lawsuit on June 21, 1996. His lis pendens was later expunged, and the DeVogelaere sale closed in August 1996.

Simon's real estate valuation expert testified the building was worth $1.5 million as of June 1996, $400,000 more than Simon was to pay under the letter of intent. San Paolo Holding's expert, who had also previously appraised the building at $1.5 million, nevertheless testified to a value of only $1 million, based in large part on the sale for that amount to the DeVogelaere group.

Simon sued San Paolo Holding for breach of contract and promissory fraud. As to breach of contract, the jury by special verdict found the parties had no "binding and enforceable agreement." As to fraud, the jury found San Paolo Holding had made "a false promise about a material matter" to Simon without the intent to perform and with the intent to defraud Simon, and that Simon had justifiably relied on the promise and was damaged in the amount of $5,000. The jury also found by clear and convincing evidence that San Paolo Holding acted with fraud, malice or oppression and awarded Simon $2.5 million in punitive damages. On San Paolo Holding's motion for a new trial, the trial court ordered a new trial on punitive damages unless Simon agreed to their reduction to $250,000. Simon declined the remittitur. On retrial of punitive damages, a new jury awarded him $1.7 million, and the trial court rendered judgment upon that award together with the $5,000 in compensatory damages.

The Court of Appeal affirmed. The United States Supreme Court granted certiorari, vacated the decision and remanded the case to the Court of Appeal for further consideration in light of *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* (2001) 532 U.S. 424 (*Cooper Industries*). Upon reconsideration, the Court of Appeal again affirmed, but the high court again granted certiorari, vacated and remanded, this time for further consideration in light of *State Farm Mut. Auto Ins. Co. v. Campbell* (2003) 538 U.S.

408 (*State Farm*). In its third decision in this matter, the Court of Appeal again affirmed the punitive damages award, holding it was not unconstitutionally excessive under guidelines established in *State Farm* and *BMW of North America v. Gore* (1996) 517 U.S. 559 (*BMW*). The appellate court concluded that the "continuous and intricate" deceit by San Paolo Holding's officer, King, was sufficiently reprehensible to support a substantial award and that the $1.7 million punitive damages award was only just over four times Simon's actual loss, the $400,000 difference between what his expert testified the building was worth and what Simon had agreed to pay for it.

We granted San Paolo Holding's petition for review, which presented the question whether the punitive damages award is unconstitutionally excessive under *State Farm* and its predecessors.[1]

DISCUSSION

In a series of decisions culminating in *State Farm, supra*, 538 U.S. 408, the United States Supreme Court has determined that the due process clause of the Fourteenth Amendment to the United States Constitution places limits on state courts' awards of punitive damages, limits appellate

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[1] Because the present petition goes only to federal issues, we do not address whether the award is excessive under state law standards. (See *Adams v. Murikami* (1991) 54 Cal.3d 105, 109-110; *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 927-928.) And because San Paolo Holding's challenge at this stage of the litigation is to the Court of Appeal's failure to reduce the award on remand from the United States Supreme Court, not to the jury instructions employed at trial, we address neither the correctness of those instructions nor the question whether, as plaintiff contends, San Paolo Holding invited any error by submitting standard instructions on punitive damages.

courts are required to enforce in their review of jury awards. (See *Pacific Mut. Life Ins. Co. v. Haslip* (1991) 499 U.S. 1, 18-24; *TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443, 453-458 (plur. opn.); *BMW, supra*, 517 U.S. at p. 568; *Cooper Industries, supra*, 532 U.S. at pp. 433-436; *State Farm, supra*, at pp. 416-418.) The imposition of "grossly excessive or arbitrary" awards is constitutionally prohibited, for due process entitles a tortfeasor to " 'fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.' " (*State Farm, supra*, at pp. 416-417, quoting *BMW, supra*, at p. 574.)

Eschewing both rigid numerical limits and a subjective inquiry into the jury's motives, the high court eventually expounded in *BMW* and *State Farm* a three-factor weighing analysis looking to the nature and effects of the defendant's tortious conduct and the state's treatment of comparable conduct in other contexts. As articulated in *State Farm*, the constitutional "guideposts" for reviewing courts are: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." (*State Farm, supra*, 538 U.S. at p. 418; see *BMW, supra*, 517 U.S. at p. 575.)

In deciding whether an award of punitive damages is constitutionally excessive under *State Farm* and its predecessors, we are to review the award de novo, making an independent assessment of the reprehensibility of the defendant's conduct, the relationship between the award and the harm done to the plaintiff, and the relationship between the award and civil penalties authorized for comparable conduct.

(*State Farm, supra*, 538 U.S. at p. 418; *Cooper Industries, supra*, 532 U.S. at pp. 436-443.) This "[e]xacting appellate review" is intended to ensure punitive damages are the product of the " 'application of law, rather than a decision-maker's caprice.' " (*State Farm, supra*, at p. 418.)[2]

On the other hand, findings of historical fact made in the trial court are still entitled to the ordinary measure of appellate deference. (*Cooper Industries, supra*, 532 U.S. at p. 440, fn. 14; see also *Leatherman Tool Group, Inc. v. Cooper Industries, Inc.* (9th Cir. 2002) 285 F.3d 1146, 1150 (decision on remand) ["Although determining the 'degree of reprehensibility' ultimately involves a legal conclusion, we must accept the underlying facts as found by the jury and the district court"].) Here, for example, the jury expressly found that the parties had no binding and enforceable agreement, but that San Paolo Holding made a fraudulent promise upon which Simon justifiably relied to his detriment in the amount of $5,000. As neither party contends these findings lack substantial evidentiary support in the record, we accept them as the factual basis for our constitutional analysis of the

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[2] The requirement of independent review applies to state as well as federal appellate courts when assessing excessiveness under the federal due process clause. (See *State Farm, supra*, 538 U.S. at pp. 418 ["courts reviewing punitive damages" must independently review *BMW* factors], 429 [remanding case to Utah Supreme Court for state courts to make a "proper calculation of punitive damages under the principles we have discussed"]; *Time Warner Entertainment Company v. Six Flags Over Georgia, LLC* (Ga.Ct.App. 2002) 563 S.E.2d 178, 180-181; *O'Neill v. Gallant Insurance Company* (Ill.App.Ct. 2002) 769 N.E.2d 100, 113.) But when no federal due process issue is involved, as when awards are reviewed for excessiveness under *state law*, the high court's decisions do not forbid greater deference to jury verdicts or trial court judgments. (*Cooper Industries, supra*, 532 U.S. at p. 433; *Time Warner Entertainment Company v. Six Flags Over Georgia, LLC, supra*, at pp. 181-182.)

punitive damages award.

The Court of Appeal, however, erred in "presum[ing]," simply from the size of the punitive damages award, that the jury found Simon had suffered "an actual loss of at least . . . $400,000." The jury made no such express finding, and to infer one from the size of the award would be inconsistent with de novo review, for the award's size would thereby indirectly justify itself. (See *Cooper Industries, supra*, 532 U.S. at pp. 441-442 [determining independently that the potential harm from defendant's unfair competition (passing off plaintiff's product as its own) did not extend to all of defendant's profits from the product for five years].)

I. Uncompensated Harm/Potential Harm

Before undertaking the multifactor evaluation mandated by *BMW, supra*, 517 U.S. 559, and *State Farm, supra*, 538 U.S. 408, we address Simon's principal arguments for upholding the award: that the $400,000 gain he assertedly would have made by purchasing the subject building for $1.1 million may be deemed a measure of either the harm San Paolo Holding's fraud actually caused him or the harm it potentially could have caused him, and that such uncompensated or potential harm may properly be considered in the comparison of punitive damages to harm required by the high court. San Paolo Holding, in contrast, contends the actual compensatory damages award, here $5,000, provides the appropriate basis for comparison under the high court's rulings.

United States Supreme Court precedents appear to contemplate, in some circumstances, the use of measures of harm beyond the compensatory damages. Thus in *State Farm*, discussing the second *BMW* "guidepost," the high court spoke repeatedly of a proportionality between punitive damages and

the harm or "potential harm " suffered by the plaintiff. (*State Farm, supra*, 538 U.S. at pp. 418, 424.) At another point (*id.* at p. 426), the court referred to the relationship between punitive damages and both "the amount of harm " and "the general damages recovered," impliedly recognizing that these two are not always identical. More explicitly, in *State Farm* the high court reiterated its recognition in *BMW* that in some cases compensatory damages are not the definitive quantification of harm because " 'the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine.' " (*State Farm, supra*, at p. 425, quoting *BMW, supra*, 517 U.S. at p. 582.)

State Farm's reference to potential harm echoed the high court's earlier decision in *TXO Production Corp. v. Alliance Resources Corp., supra*, 509 U.S. 443 (*TXO*), a business tort case in which the court approved a $10 million punitive damages award on compensatory damages of only $19,000. The plurality opinion relied heavily on the economic injuries the defendant's scheme to cheat the plaintiff of oil and gas royalties could have caused had it succeeded, injuries estimated in the millions of dollars. (*Id.* at pp. 459-462.) "It is appropriate to consider the magnitude of the *potential harm* that the defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded . . . ." (*Id.* at p. 460; see also *id.* at p. 484 (dis. opn. of O'Conner, J.) ["I have no quarrel with the plurality that, in the abstract, punitive damages may be predicated on the potential but unrealized harm to the victim"].)

In the wake of *TXO, BMW* and *State Farm*, a large number of federal and state courts have, in a variety of factual contexts, considered uncompensated or potential harm as part

of the predicate for a punitive damages award.[3] In the present

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[3] See, e.g., *Romo v. Ford Motor Co.* (2003) 113 Cal.App.4th 738, 760-761 (considering harm to decedents that cannot be recovered under California law); *Mathias v. Accor Economy Lodging, Inc.* (7th Cir. 2003) 347 F.3d 672, 677 (relatively large ratio between punitive and compensatory damages for rental of motel room infested with bedbugs justified in part because "the compensable harm done was . . . difficult to quantify because a large element of it was emotional"); *DiSorbo v. Hoy* (2d Cir. 2003) 343 F.3d 172, 187 (where jury awarded only nominal damages on abuse of process claim, ratio between punitive and compensatory damages was " 'not the best tool' " for analysis); *Continental Trend Resources, Inc. v. OXY USA* (10th Cir. 1996) 101 F.3d 634, 639-640 (potential harm from tortious interference with contract may be considered); *In re the Exxon Valdez* (D.Alaska 2004) 296 F.Supp.2d 1071, 1103 (had ship captain succeeded in backing oil tanker off reef, additional oil could have spilled, causing "immense and incalculable" additional harms); *Southern Union Company v. Southwest Gas Corporation* (D.Ariz. 2003) 281 F.Supp.2d 1090, 1099-1105 (unquantifiable harm from breach of public trust and potential harm from intentional interference with corporate merger may be considered to justify relatively large punitive damages award against state corporations commissioner); *Parrish v. Sollecito* (S.D.N.Y. 2003) 280 F.Supp.2d 145, 163 (potential emotional distress from illegal discrimination and retaliation increases reprehensibility); *Craig v. Holsey* (Ga.Ct.App. 2003) 590 S.E.2d 742, 744, 748 (while plaintiff in automobile accident case actually suffered only about $8,800 in damages, she "could have died as a result of [defendant's] driving under the influence"); *In re New Orleans Train Car Leakage Fire Litigation* (La.Ct.App. 2001) 795 So.2d 364, 386 (justifying size of punitive damages award in part by observing that if train car leaking flammable gas had exploded as well as burning "whole city blocks of a residential area could have been destroyed"); *Medeja v. MPB Corporation* (N.H. 2003) 821 A.2d 1034, 1050-1051 (relatively high ratio between punitive and compensatory damages permitted in sexual harassment case due to "the difficulty of measuring actual damages where the injury is primarily personal"); *Trinity Evangelical Lutheran Church v. Tower Ins. Co.* (Wis. 2003) 661 N.W.2d 789, 803 (considering potential injury had insurer's bad faith denial of coverage succeeded at summary judgment). By citing these cases, we do not necessarily indicate agreement with each particular result.

case, however, we conclude that the $400,000 in profit that plaintiff might have gained by purchasing the building is not a proper consideration.

As explained above, we must determine independently the relationship between the harm done plaintiff and the amount awarded in punitive damages. (*Cooper Industries, supra*, 532 U.S. at pp. 436-440.) While we defer to express jury findings supported by the evidence (see *ante*, at p. 9), in the absence of an express finding on the question we must independently decide whether defendant's promissory fraud did, or foreseeably could have, hurt plaintiff in the amount of $400,000.

The first jury did not specify the "false promise about a material matter" it found San Paolo Holding had made. Based on the evidence and argument, the finding could refer to San Paolo Holding's express promise, in the letter of intent, to "proceed to escrow and attempt to complete a transaction" on the agreed terms, to its express promise to "exclusively negotiate," to its implied promise to seek approval from the New York office for a sale on the agreed terms, or to any combination of these. None of these possible false promises, however, was the factual cause of a $400,000 loss to Simon. Had San Paolo Holding never promised to proceed to escrow, never promised to negotiate exclusively with Simon, and never promised to seek the New York office's approval, Simon would still not have obtained the property. Simon, the first jury found, had no contractual right to buy the property. Consequently, San Paolo Holding's promissory fraud did not deprive him of property he would otherwise have obtained; it merely led him, as the jury indeed found, to spend $5,000 to retain an attorney in anticipation of opening escrow.

Gray v. Don Miller & Associates, Inc. (1984) 35 Cal.3d 498 is closely on point. The plaintiff made an offer to purchase real property for his business. The broker falsely told him the sellers had accepted his offer, leading him to expend various sums in anticipation of closing the purchase and moving to the new site. In the plaintiff's action against the broker for fraud, we held he was entitled to the amounts he had spent in reliance on the misrepresentation, but not to claimed "delay damages" for increases in the cost of construction during the six-month period he believed the purchase would proceed. (*Id.* at p. 504.) The plaintiff's inability to promptly begin renovating the property for his business, we explained, "was not caused by [the broker's] misrepresentation, but by the sellers' refusal to accept his offer of sale." (*Ibid.*; accord, *Kenly v. Ukegawa* (1993) 16 Cal.App.4th 49, 53-55 [where defendant falsely promised to sell plaintiff farm property, plaintiff may recover only costs incurred in reliance on the promise, not profits that would have been gained had he purchased and resold the property].)

Simon contends, and the Court of Appeal agreed, that he was precluded from recovering the $400,000 in lost profits only by operation of Civil Code section 3343, subdivision (a)(1), which in effect sets damages for a defrauded *attempted* purchaser of property at the "[a]mounts actually and reasonably expended in reliance upon the fraud." We disagree. Regardless of the effect of Civil Code section 3343, Simon could not recover those lost profits on his promissory fraud cause of action because *the fraud did not cause them*. Fraudulent promises to sell (as in *Kenly v. Ukegawa, supra*, 16 Cal.App.4th at p. 55), fraudulent representations that an offer to purchase has been accepted (as in *Gray v. Don Miller & Associates, Inc., supra*, 35 Cal.3d at p. 504) or, as here, fraudulent promises to negotiate exclusively and proceed to escrow may cause the attempted buyer to expend money in

reliance, but they do not themselves cause the losses occasioned by the attempted buyer's failure to actually obtain the property. That injury is instead caused by the seller's breach of an enforceable contractual obligation to sell the property—where one exists. If Simon had prevailed on his breach of contract cause of action, he would have been entitled to recover on that cause of action the benefit of his bargain, here assertedly $400,000, because San Paolo Holding's refusal to sell to him caused that injury. (See Civ. Code, § 3306.) But San Paolo Holding in fact had no contractual obligation to sell Simon the property. It had an obligation—imposed by law—not to fraudulently promise to sell Simon the property, but had San Paolo Holding complied with its legal obligation by refraining from making false promises, Simon still would not have obtained the property.[4]

This is not a case like *Neal v. Farmers Ins. Exchange, supra*, 21 Cal.3d 910, in which a statute barred recovery of damages actually caused by the defendant's tortious acts. In that insurance bad faith case, the plaintiff died before judgment, precluding her estate's recovery of damages for emotional distress. (*Id.* at p. 920, fn. 3; see Code Civ. Proc., § 377.34 (formerly Prob. Code, § 573).) Considering it "likely that absent this limitation plaintiff would have recovered a substantial additional amount in compensation for emotional distress," this court held the disparity between the relatively

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[4] Simon cites our decision in *Lazar v. Superior Court* (1996) 12 Cal.4th 631, 646, for the proposition that fraud plaintiffs generally may recover benefit-of-bargain as well as out-of-pocket damages. The reliance is misplaced: our reference in that decision to benefit-of-bargain damages was to their recovery under a *contract* cause of action. (See *Tavaglione v. Billings* (1993) 4 Cal.4th 1150, 1159.) On a different point, nothing we say in this case affects the scope of damages recoverable for fraud committed by a fiduciary. (See *Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1240-1241.)

small compensatory damages award and the significant award of punitive damages did not require nullification of the latter under state law. (*Neal v. Farmers Ins. Exchange, supra*, at p. 929; see also *Romo v. Ford Motor Co., supra*, 113 Cal.App.4th at pp. 760-761 [reaching similar conclusion under *State Farm*].) Farmers' bad faith conduct had actually caused Mrs. Neal substantial emotional distress; her estate was barred from recovering such damages only by Probate Code former section 573. In contrast, San Paolo Holding's false promise or promises, as we have seen, did not cause Simon's failure to obtain the property; even in the absence of Civil Code section 3343, subdivision (a)(1), he would not be entitled to recover benefit-of-the-bargain damages for San Paolo Holding's promissory fraud.

Simon also contends San Paolo Holding's fraud was intended to cause him, or risked causing him, "potential losses . . . well in excess of $455,000." In addition to the $400,000 anticipated profit from acquiring the building and his $5,000 out-of-pocket loss, Simon includes in this sum the $50,000 deposit that was, under the letter of intent, to become nonrefundable upon completion of inspections and due diligence on June 26, 1996. Simon argues that had he agreed to King's demand to move the completion date up to June 21, King "would likely have strung [him] along until the 22nd, and then manufactured some other reason to back out of the sale," resulting in the loss of his deposit. Simon further contends his potential losses include an unquantified financial impact: had he given up his leased business premises after signing the letter of intent, he would then have "found himself on the street" when San Paolo Holding pulled out of the sale. We conclude, however, that these asserted potential injuries, like the uncompensated harm Simon claims, may not be considered in assessing the ratio of punitive damages to harm.

The potential harm that is properly included in the due process analysis is " 'harm *that is likely to occur from the defendant's conduct.*' " (*TXO, supra*, 509 U.S. at p. 460.) In *TXO*, the high court, quoting from the state court decision, gave a hypothetical illustration: " 'For instance, a man wildly fires a gun into a crowd. By sheer chance, no one is injured and the only damage is to a $10 pair of glasses. A jury reasonably could find only $10 in compensatory damages, but thousands of dollars in punitive damages to teach a duty of care.' " (*Id.* at p. 459.) A potential injury that was foreseeable from the defendant's conduct—whether because it constituted an unintended but reasonably likely risk or because it was a goal of the tortfeasor's conduct—is properly considered because a tortfeasor had notice of the likelihood of such an injury. Considering such injuries in assessing punitive damages therefore comports with the due process mandate that "a person receive fair notice . . . of the severity of the penalty that a State may impose." (*BMW, supra*, 517 U.S. at p. 574.)

In *TXO* itself, the defendant, hoping to renegotiate downward the royalties it had agreed to pay for development of the plaintiff's oil and gas rights, had solicited a false affidavit impairing the plaintiff's title, then brought an unsuccessful declaratory relief action in state court. (*TXO, supra*, 509 U.S. at pp. 448-449.) The high court plurality held it appropriate to consider the harm "the defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded." (*Id.* at p. 460.) Other cases have also considered foreseeable potential injuries in the punitive damages-to-harm ratio.[5]

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[5] See *Southern Union Company v. Southwest Gas Corporation, supra*, 281 F.Supp.2d at page 1104, footnote 5 (where defendant corporations commissioner's "undisputed experience and knowledge made him aware

By contrast, in *Pulla v. Amoco Oil Company* (8th Cir. 1995) 72 F.3d 648, where the employer defendant had invaded the employee plaintiff's private credit card records to determine whether he had been abusing sick leave, the potential injury to other employees from similar conduct could not properly be considered because such injury was not "*likely* to occur" from the defendant's tortious conduct—the plaintiff "failed to present any evidence that Amoco put any other individual's privacy at risk." (*Id.* at p. 660.) And in *Leatherman Tool Group, Inc. v. Cooper Industries, Inc., supra*, 285 F.3d at page 1149, the appellate court declined to consider as a measure of potential harm all of the gross profits the defendant might have made on its copycat product had the plaintiff not obtained a preliminary injunction against the product's sale, as the sale of the copied product was not itself illegal, though passing it off as the plaintiff's was.

The present case more closely resembles the last cited decisions, in which the asserted potential injuries were not foreseeable results of the defendant's tortious conduct, than it does the decisions approving consideration of potential losses. The $400,000 in profit Simon claims he would have earned by acquiring the property cannot be considered potential harm from San Paolo Holding's promissory fraud because, in the absence of any contractual obligation to sell Simon the

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of the potential enormous risks his conduct would have in disrupting a multimillion dollar transaction"); *In re New Orleans Train Car Leakage Fire Litigation, supra*, 795 So.2d at page 386 (where defendant railroad's reckless conduct "could have" resulted in a "monumental catastrophe"); *Trinity Evangelical Lutheran Church v. Tower Ins. Co., supra*, 661 N.W.2d at pages 793-794, 803 (where defendant insurer had unsuccessfully sought, by summary judgment, to avoid coverage that the parties had intended to include in the policy, making it proper to consider the further injury to the insured that would have resulted had the insurer's attempt to avoid coverage succeeded).

property, San Paolo Holding's tortious conduct could not have had the foreseeable effect of depriving Simon of an entitlement to purchase it. As in *Leatherman Tool Group, Inc. v. Cooper Industries, Inc., supra*, 285 F.3d at page 1149, Simon erroneously characterizes damages he might have obtained on another cause of action, one on which he did not prevail, as potential damages for the cause of action on which he did prevail. And, as in *Pulla v. Amoco Oil Company, supra*, 72 F.3d at pages 659-660, Simon's potential loss of his $50,000 deposit was simply not shown to be a likely result of defendant's fraud: to obtain the $50,000, San Paolo Holding would first have had to open escrow, which required entering into a binding contract of sale, giving Simon an enforceable right to purchase. The same may be said of Simon's possible cancellation of his then current leasing arrangement: that he might do so without first entering into a binding purchase contract was not foreseeable, and had he done so after executing such a contract he would not have been "out on the street" because he could have enforced the contract. As observed by an amicus curiae, "there is no basis for believing that San Paolo [Holding] knew that Simon was at risk of having no place to operate his business, much less intended him to suffer that consequence."

As the record does not reveal the goals of San Paolo Holding's fraud, it is difficult to say what injuries beyond his $5,000 out-of-pocket loss, if any, Simon would have suffered had those goals been achieved. To the extent King, for reasons that are not apparent,[6] simply wanted to keep Simon on the hook as long as possible, he succeeded, but Simon's

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[6] Simon has suggested that King had a personal financial motive for ultimately selling to the DeVogelaere group rather than to Simon. Even if true, this would not explain why King first executed a letter of intent with Simon.

only resulting loss, as far as the record shows, was the $5,000 retainer. (See *Bains LLC v. Arco Products Company* (9th Cir. 2005) 405 F.3d 764 [no potential harm to be added to compensatory damages where the defendant's wrongful conduct succeeded].) King's scheme, whatever it was, evidently did not extend to executing and then breaching a binding contract of sale, for he had the opportunity to execute such a contract on June 13, 1996, and instead broke off dealings with Simon. We are thus unable to conclude Simon demonstrated the existence of substantial potential damages representing harm "the defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded." (*TXO, supra*, 509 U.S. at p. 460.)

The $5,000 award of compensatory damages, therefore, must be considered the true measure of the harm (or potential harm) San Paolo Holding's tortious act caused to Simon.

II. Evaluation of the Award Under *State Farm* and *BMW*

We now consider in sequence the three guideposts prescribed by the high court: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." (*State Farm, supra*, 538 U.S. at p. 418; see *BMW, supra*, 517 U.S. at p. 575.)

A. Degree of Reprehensibility

The high court in both *BMW* and *State Farm* recognized that "the most important indicium of the reasonableness of a

punitive damages award is the degree of reprehensibility of the defendant's conduct." (*State Farm, supra*, 538 U.S. at p. 419; *BMW, supra*, 517 U.S. at p. 575.) In *State Farm*, the court summarized the subsidiary factual circumstances it believed particularly relevant to assessing reprehensibility: "We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident." (*State Farm, supra*, at p. 419.)

Here, defendant's tortious acts caused only economic harm and did not show disregard of others' health or safety. The first two subfactors are clearly inapplicable.

The parties dispute whether Simon was financially vulnerable, but we assess this factor as essentially neutral. While San Paolo Holding had financial resources vastly superior to Simon's, the transaction was an arm's-length one upon which neither party depended for economic survival or security; Simon wanted to buy the office building and San Paolo Holding wanted to sell it (albeit seemingly not to Simon), but neither *needed* for the transaction to go through. This limited the leverage San Paolo Holding's superior financial position might otherwise have given it over Simon.

Similarly, although San Paolo Holding's conduct could be characterized as more than a single isolated incident, as the evidence showed deceptive conduct by King spanning several weeks, the tortious act on which liability was based was a single false promise (or set of promises) made in the letter of

intent, and no evidence indicated King had acted similarly toward other potential buyers. Unlike, for example, the defendant in our companion case of *Johnson v. Ford Motor Co.* (June 16, 2005, S121723) ___ Cal.4th ___, San Paolo Holding cannot be characterized as a repeat offender. This subfactor, too, fails to support a high assessment of reprehensibility.

Finally, San Paolo Holding concedes King's making of one or more intentionally false promises, as the jury found he did, constitutes "intentional . . . deceit" (*State Farm, supra*, 538 U.S. at p. 419) rather than a "mere accident" (*ibid.*). We agree this subfactor applies. True, a comparison to accidentally caused harm is of little value in assessing a California punitive damages award, as accidentally harmful conduct cannot provide the basis for punitive damages under our law. At a minimum, California law requires conduct done with "willful and conscious disregard of the rights or safety of others" or despicable conduct done "in conscious disregard" of a person's rights. (Civ. Code, § 3294, subd. (c)(1), (2); see *Taylor v. Superior Court* (1979) 24 Cal.3d 890, 895-896 [conscious disregard means "that the defendant was aware of the probable dangerous consequences of his conduct, and that he wilfully and deliberately failed to avoid those consequences"].) The jury's finding that King made false promises with the *intent to defraud* Simon shows he was not merely indifferent to, but actively sought an injury to, Simon's rights. He did so, moreover, through affirmative misrepresentation, not merely nondisclosure. (See *BMW, supra*, 517 U.S. at p. 580 ["[T]he omission of a material fact may be less reprehensible than a deliberate false statement"].) The final reprehensibility subfactor, then, does weigh on the plus side of the scale.

In sum, of the five subfactors relevant to reprehensibility, only one applies. In the universe of cases warranting punitive damages under California law, the fraudulent promise or promises that led to San Paolo Holding's liability have to be regarded as of relatively low culpability.

B. Ratio of Punitive Damages to Actual or Potential Harm

While the high court had in *BMW* and earlier decisions already demanded that punitive damages bear a " 'reasonable relationship' " to compensatory damages (*BMW, supra*, 517 U.S. at p. 580) and had in *BMW* made that relationship one of the three "guideposts" for due process evaluation (*id.* at pp. 574-575, 580-581), the decision in *State Farm* addressed this guidepost with markedly greater emphasis and more constraining language. "If, in [*BMW*], the high court threw a lasso around the problem of what it had previously identified as 'punitive damages awards " 'run wild' " ' [citation], in [*State Farm*] it tightened the noose considerably." (*Bardis v. Oates* (2004) 119 Cal.App.4th 1, 19.)

In *BMW*, the court not only abjured drawing " 'a mathematical bright line,' " but observed that "[i]n most cases, the ratio will be within a constitutionally acceptable range," disapproving only the "breathtaking 500 to 1" ratio in the case before it. (*BMW, supra*, 517 U.S. at p. 583.) In *State Farm*, while still "declin[ing] . . . to impose a bright-line ratio which a punitive damages award cannot exceed," the court went on to hold that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." (*State Farm, supra*, 538 U.S. at p. 425.) The court also explained that past decisions and statutory penalties approving ratios of three or four to one were "instructive" as to the due process norm, and that while

relatively high ratios could be justified when " 'a particularly egregious act has resulted in only a small amount of economic damages' [citation] . . . [t]he converse is also true . . . . When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." (*Ibid.*)

We understand the court's statement in *State Farm* that "few awards" significantly exceeding a single-digit ratio will satisfy due process to establish a type of presumption: ratios between the punitive damages award and the plaintiff's actual or potential compensatory damages significantly greater than nine or 10 to one are suspect and, absent special justification (by, for example, extreme reprehensibility or unusually small, hard-to-detect or hard-to-measure compensatory damages), cannot survive appellate scrutiny under the due process clause.[7] As stated in *Williams v. Conagra Poultry Company* (8th Cir. 2004) 378 F.3d 790, 799, a ratio significantly greater than single digits "alerts the court to the need for special justification." (See also *Bardis v. Oates, supra*, 119 Cal.App.4th at p. 22 [42-to-one ratio "cannot stand unless extraordinary factors are present"]; *McClain v. Metabolife International, Inc., supra*, 259 F.Supp.2d at p. 1231 ["red flag goes up" when ratio exceeds single digit].)

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[7] Though one court has referred to a nine-to-one ratio as the constitutional trigger point (*McClain v. Metabolife International, Inc.* (N.D.Ala. 2003) 259 F.Supp.2d 1225, 1231), one could also argue a "single-digit" ratio includes anything less than 10 to one. (See *Hollock v. Erie Insurance Exchange* (Pa. 2004) 842 A.2d 409, 422 [10-to-one ratio "just barely exceeds" single-digit level].) The question is of little or no importance, however, as the presumption of unconstitutionality applies only to awards exceeding the single-digit level "to a significant degree." (*State Farm, supra*, 538 U.S. at p. 425.)

Multipliers *less* than nine or 10 are not, however, presumptively *valid* under *State Farm*. Especially when the compensatory damages are substantial or already contain a punitive element, lesser ratios "can reach the outermost limit of the due process guarantee." (*State Farm, supra*, 538 U.S. at p. 425.) But we do not agree with the court in *Diamond Woodworks, Inc. v. Argonaut Insurance Company* (2003) 109 Cal.App.4th 1020, 1057, that "in the usual case" the high court's decisions establish an "outer constitutional limit" of approximately *four* times the compensatory damages. Reviewing the history of double, triple and quadruple damages, the court in *State Farm* warned that "these ratios are *not binding*," but only "instructive." (*State Farm, supra*, at p. 425, italics added.) Moreover, their instruction, what "[t]hey demonstrate," is simply that "[*s*]*ingle digit* multipliers are more likely to comport with due process" than ratios of 500 to 1, as in *BMW*, or 145 to 1, as in *State Farm*. (*Ibid.*, italics added.)

Measurement of damages is, of course, far from exact, a fact reflected in the high court's qualification of its single-digit presumption: only awards exceeding that level "to a significant degree" are constitutionally suspect. (*State Farm, supra*, 538 U.S. at p. 425.) As due process does not entitle a tortfeasor to notice of the *precise* amount the state may penalize him or her, "[t]he judicial function is to police a range, not a point" (*Mathias v. Accor Economy Lodging, Inc., supra*, 347 F.3d at p. 678).

The disputed $1.7 million punitive damages award to Simon was 340 times his $5,000 award of compensatory damages. This qualifies as a "breathtaking" multiplier (*BMW, supra*, 517 U.S. at p. 583), far outside the "single-digit neighborhood" (*Bocci v. Key Pharmaceuticals, Inc.* (Or.Ct.App. 2003) 76 P.3d 669, 675, mod. on other grounds

and adhered to as mod., 79 P.3d 908) suggested by the high court in *State Farm*. As we have already determined, moreover, the $5,000 compensatory award accurately measures the actual harm done to Simon, and Simon failed to demonstrate that San Paolo Holding's fraud threatened to cause him substantial additional harm. (See pt. I., *ante*.) Nor can the 340-to-one ratio here be justified on the ground that " 'a *particularly* egregious act has resulted in only a small amount of economic damages' " (*State Farm, supra*, 538 U.S. at p. 425, italics added), for while San Paolo Holding's fraud qualified for punitive damages under California law, compared to conduct in other punitive damages cases it was not highly reprehensible. (See pt. II.A., *ante*; accord, *Atkinson v. Orkin Exterminating Co., Inc.* (S.C. 2004) 604 S.E.2d 385, 393 [despite "particlarly low" compensatory damages of $6,191, ratio of 127 to 1 not justified because conduct not sufficiently egregious].)

Measured against the second *BMW/State Farm* guidepost, therefore, the punitive damages award is grossly excessive.

C. Comparable Civil Penalties

The third guidepost is less useful in a case like this one, where plaintiff prevailed only on a cause of action involving "common law tort duties that do not lend themselves to a comparison with statutory penalties" (*Continental Trend Resources v. OXY USA, Inc., supra*, 101 F.3d at p. 641), than in a case where the tort duty closely parallels a statutory duty for breach of which a penalty is provided. The parties have not drawn our attention to any specific statutory civil penalties for promissory fraud in a business transaction, though defendant cites Business and Professions Code section 17206, allowing a $2,500 penalty for unfair competition (which, as the lower court noted, does not necessarily involve fraudulent

acts). The Court of Appeal, in turn, cited provisions providing for treble fines or damages for fraudulent or deceptive acts in other contexts (e.g., Civ. Code, §§ 3345 [deceptive practices causing economic injury to disabled or senior persons], 1947.10 [fraudulent eviction in municipality with rent controls]), as well as statutes criminalizing theft by fraud (Pen. Code, §§ 182, subd. (a)(4), 484, subd. (a); see also *id.*, § 672 [fine of $1,000 for misdemeanor and $10,000 for felony]). [8]

While comparison to these statutory penalties cannot tell us precisely how large an award would be constitutional, it clearly does not tend to support the present award of $1.7 million dollars in punitive damages, a sum 340 times the financial harm defendant's fraud caused plaintiff.

D. The Role Played by the Defendant's Financial Condition

Plaintiff contends a substantial reduction will make the punitive damages so small as to be written off as a cost of doing business, negating the state's interest in deterring repetition or imitation of defendant's conduct. Defendant counters that after *BMW* and *State Farm*, the small size of an award in comparison to the defendant's financial condition is no longer a factor to consider in assessing excessiveness. We briefly address the question of a defendant's wealth or

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[8] In *State Farm*, the high court explained the limited value of comparing punitive damages to criminal penalties: "The existence of a criminal penalty does have bearing on the seriousness with which a State views the wrongful action. When used to determine the dollar amount of the award, however, the criminal penalty has less utility. Great care must be taken to avoid use of the civil process to assess criminal penalties that can be imposed only after the heightened protections of a criminal trial have been observed, including, of course, its higher standards of proof." (*State Farm, supra*, 538 U.S. at p. 428.)

financial condition in relation to the state's interests in punishing and deterring a defendant's wrongful conduct.

Where the defendant's oppression, fraud or malice has been proven by clear and convincing evidence, California law permits the recovery of punitive damages "for the sake of example and by way of punishing the defendant." (Civ. Code, § 3294, subd. (a).) As we explained in *Neal v. Farmers Ins. Exchange, supra*, 21 Cal.3d at page 928, and *Adams v. Murikami, supra*, 54 Cal.3d at pages 110-112, the defendant's financial condition is an essential factor in fixing an amount that is sufficient to serve these goals without exceeding the necessary level of punishment. "[O]bviously, the function of deterrence . . . will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort." (*Neal v. Farmers Ins. Exchange, supra*, at p. 928.) "[P]unitive damage awards should not be a routine cost of doing business that an industry can simply pass on to its customers through price increases, while continuing the conduct the law proscribes." (*Lane v. Hughes Aircraft Co.* (2000) 22 Cal.4th 405, 427 (conc. opn. of Brown, J.).) On the other hand, "the purpose of punitive damages is not served by financially destroying a defendant." (*Adams v. Murikami, supra*, at p. 112.)

Due process does not preclude a state from using punitive damages for the purposes of deterrence. As the high court stated in *State Farm, supra*, 538 U.S. at page 416, " 'Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition.' " Indeed, in *BMW* the high court made clear that a court reviewing the jury's award for due process compliance, under its guideposts, should consider whether the level of punishment imposed is necessary to vindicate the state's legitimate interests in deterring conduct

harmful to state residents. Acknowledging the state's interests in punishment and deterrence, the court continued: "Only when an award can fairly be categorized as 'grossly excessive' in relation to these interests does it enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment." (*BMW, supra*, 517 U.S. at p. 568.) After reviewing the three guideposts, the court held the award in *BMW* was excessive in light of the guideposts, even considering the state's interest in deterrence, because the record did not show "whether less drastic remedies could be expected to achieve that goal," that is, "whether a lesser deterrent would have adequately protected the interests of Alabama consumers." (*Id.* at p. 584.) Finally, the court indicated that on remand the Alabama Supreme Court was either to order a new trial or itself determine what award was "necessary to vindicate the economic interests of Alabama consumers." (*Id.* at p. 586.)

Because a court reviewing the jury's award for due process compliance may consider what level of punishment is necessary to vindicate the state's legitimate interests in deterring conduct harmful to state residents, the defendant's financial condition remains a legitimate consideration in setting punitive damages. (See *State Farm, supra*, 538 U.S. at p. 428 [use of wealth as a factor not " 'unlawful or inappropriate' "].) The *State Farm* court, however, also emphasized that wealthy defendants are equally entitled to due process and that "[t]he wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." (*Id.* at p. 427.) Quoting from Justice Breyer's concurring opinion in *BMW*, the court disapproved using wealth as " 'an open ended basis for inflating awards' " and warned that wealth cannot replace reprehensibility as a constraining principle. (*State Farm, supra*, at pp. 427-428.)

Reading the high court's decisions as a whole, we agree with the Eleventh Circuit Court of Appeals that while wealth cannot substitute for the high court's guideposts in limiting awards, and cannot alone justify a high award, the guideposts were not intended "to prevent juries from levying awards that serve important state interests and provide a meaningful deterrent against corporate misconduct." (*Kemp v. American Telephone & Telegraph Co.* (11th Cir. 2004) 393 F.3d 1354, 1365.) The *BMW/State Farm* guideposts cannot be abandoned or ignored, but in determining whether a lesser award "could have satisfied the State's legitimate objectives" (*State Farm, supra*, 538 U.S. at p. 420), a reviewing court may nonetheless give some consideration to the defendant's financial condition.[9]

We need not in this case attempt to delineate the relationship between wealth and the *BMW/State Farm* guideposts under all circumstances. In some cases, the

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[9] Accord, *Bardis v. Oates, supra*, 119 Cal.App.4th at page 26 (considering wealth for purpose of deterrence while recognizing that under *State Farm* "the wealth of the defendant will not *by itself* compensate for a lack of other factors"); *Bains LLC v. Arco Products Company, supra*, 405 F.3d at p. 777 [wealth properly considered "in determining an award that will carry the right degree of sting," but cannot make up for absence of reprehensibility]; *Kemp v. American Telephone & Telegraph Co., supra*, 393 F.3d at page 1365, footnote 9 (wealth cannot be sole basis for a large punitive damages award but is a "legitimate consideration" in determining reasonableness of jury's award); *Mathias v. Accor Economy Lodging, Inc., supra*, 347 F.3d at page 677 (while under *State Farm* "wealth is not a sufficient basis for awarding punitive damages," it may nonetheless be considered in relation to costs of obtaining compensation in litigation); *Hollock v. Erie Insurance Exchange, supra*, 842 A.2d at page 421 (same); *Eden Electrical, Ltd. v. Amana Company*, L.P. (N.D.Iowa 2003) 258 F.Supp.2d 958, 975 (reviewing court, in some circumstances, may "throw into the balance" defendant's financial condition).

defendant's financial condition may combine with high reprehensibility and a low compensatory award to justify an extraordinary ratio between compensatory and punitive damages. (See, e.g., *Kemp v. American Telephone & Telegraph Co., supra*, 393 F.3d at pp. 1357, 1365 [where defendant played a "critical role" in conduct of illegal gambling scheme, punitive damages of $250,000 on only $115 in compensatory damages were justified in part by need for "meaningful deterrent" to illegal conduct by large corporation].) In other cases, especially those involving substantial compensatory awards, the level of deterrence may be limited, after *State Farm*, to that provided "as a natural result of imposing damages over and above traditional compensatory damages, not from the imposition of sanctions in an individual case that are actually disabling to the defendant" (*Romo v. Ford Motor Co., supra*, 113 Cal.App.4th at p. 750); the state may have to partly yield its goals of punishment and deterrence to the federal requirement that an award stay within the limits of due process. But when, as in the present case, the reprehensibility of the defendant's conduct is relatively low, the state's interest in punishing it and deterring its repetition is correspondingly slight. Here, neither the interest in deterrence nor San Paolo Holding's substantial wealth can conceivably justify enforcing the jury's award of $1.7 million for a false promise that caused only a $5,000 injury.[10]

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[10] This is true whether we use the $46 million San Paolo Holding had in 1996 or the $4.8 million it had in 1998, after transferring cash to its corporate parent. We consider the higher number more appropriate, however, because it more closely reflects San Paolo Holding's condition at the time of the tortious acts whose repetition or imitation the law seeks to deter.

III. The Maximum Constitutional Award

A. Appellate Determination vs. Remittitur

Our review of the *BMW/State Farm* guideposts, even in light of California's interest in punishing and deterring fraudulent conduct, leads to the conclusion that the jury's award of $1.7 million in punitive damages is grossly excessive. The Court of Appeal erred in holding to the contrary. We could end our discussion here and remand to the Court of Appeal for that court to reduce the award to the constitutionally allowed maximum. But because this litigation has already lasted more than eight years, a process so far including two trips to the United States Supreme Court and three decisions by the Court of Appeal, we believe the better course is for this court itself to determine the maximum punitive damages award that satisfies the constraints of due process and to order the judgment reduced accordingly.

Moreover, we agree with San Paolo Holding that the appropriate order is for an absolute reduction, rather than a conditional reduction with the alternative of a new trial, i.e., a remittitur. As constitutional excessiveness is a legal issue appellate courts determine independently (*State Farm, supra*, 538 U.S. at p. 418; *Cooper Industries, supra*, 532 U.S. at pp. 436-443), we do not, in determining the maximum constitutional award ourselves, decide any question of fact plaintiff has a right to have decided by a jury. (*Johansen v. Combustion Engineering, Inc.* (11th Cir. 1999) 170 F.3d 1320, 1331 (*Johansen*) ["Plaintiff's consent is irrelevant if the Constitution requires the reduction"]; *Leatherman Tool Group, Inc. v. Cooper Industries, Inc., supra*, 285 F.3d at p. 1151 [following *Johansen*: "[A]n appellate court need not remand for a new trial in every case in which it finds that a punitive damages award exceeds the constitutional maximum.

. . . We therefore will determine the constitutional maximum on the basis of the existing record"]; see, e.g., *Bardis v. Oates, supra*, 119 Cal.App.4th at pp. 26-27 [Court of Appeal reduces punitive damages award to due process limit and affirms as modified, without offering plaintiff a new trial alternative].)

Once a maximum constitutional award has been determined, moreover, a new trial on punitive damages would be futile. "Giving a plaintiff the option of a new trial rather than accepting the constitutional maximum for this case would be of no value. If, on a new trial, the plaintiff was awarded punitive damages *less* than the constitutional maximum, he would have lost. If the plaintiff obtained *more* than the constitutional maximum, the award could not be sustained. Thus, a new trial provides only a 'heads the defendant wins; tails the plaintiff loses' option." (*Johansen, supra*, 170 F.3d at p. 1332, fn. 19.)

B. Determination of Maximum Award

To state a particular level beyond which punitive damages in a given case would be grossly excessive, and hence unconstitutionally arbitrary, " 'is not an enviable task. . . . In the last analysis, an appellate panel, convinced it must reduce an award of punitive damages, must rely on its combined experience and judgment.' " (*Leatherman Tool Group, Inc. v. Cooper Industries, Inc., supra*, 285 F.3d at p. 1152.) The high court's due process analysis does not easily yield an exact figure: we must attempt to arrive at such a number using imprecisely determined facts and "applying guidelines that contain no absolutes." (*Continental Trend Resources v. OXY USA, Inc., supra*, 101 F.3d at p. 643.) An appellate court should keep in mind, as well, that its constitutional mission is only to find a level higher than which an award *may not* go; it is not to find the "right" level in the court's own view. While

we must, under *Cooper Industries, supra*, 532 U.S. 424, assess independently the wrongfulness of a defendant's conduct, our determination of a maximum award should allow some leeway for the possibility of reasonable differences in the weighing of culpability. In enforcing federal due process limits, an appellate court does not sit as a replacement for the jury but only as a check on arbitrary awards. (See *BMW, supra*, 517 U.S. at p. 568 ["States necessarily have considerable flexibility in determining the level of punitive damages they will allow . . . in any particular case"].)

Referring to our earlier reprehensibility analysis and using the comparisons to compensatory damages and civil penalties for calibration, we conclude the maximum here lies at $50,000, or 10 times the compensatory award. This amount, we believe, will "further [California's] legitimate interests in punishing unlawful conduct and deterring its repetition" (*BMW, supra*, 517 U.S. at p. 568)_interests limited here by the relatively light culpability of the conduct_without exceeding a level "both reasonable and proportionate to the amount of harm to the plaintiff" (*State Farm, supra*, 538 U.S. at p. 426).

We have already explained the reasons for our evaluation of San Paolo Holding's reprehensibility as low, and the presumption against awards significantly exceeding a single-digit multiplier of the actual or potential harm inflicted. (See pts. II.A. & II.B., *ante*.) In *State Farm*, the high court made clear that due process permits a higher ratio between punitive damages and a small compensatory award for purely economic damages containing no punitive element than between punitive damages and a substantial compensatory award for emotional distress; the latter may be based in part on indignation at the defendant's act and may be so large as to serve, itself, as a deterrent. (*State Farm, supra*, 538 U.S. at

pp. 425-426.) Here the $5,000 award was for purely economic damages containing no punitive element and is quite small. Yet the compensatory award here, as earlier discussed, did accurately measure the injury proven to have been inflicted. (See pt. I., *ante*.) This was not a case where the harm could not be quantified and only nominal damages were awarded. (See, e.g., *DiSorbo v. Hoy, supra*, 343 F.3d at p. 187.) The nature and size of the compensatory award here thus militates for a maximum award at the top of, but not significantly beyond, the single-digit range.

A penalty of $50,000, though just exceeding the largest single-digit ratio amount, is in absolute size not extraordinary for fraudulent conduct. (See, e.g., *Mathias v. Accor Economy Lodging, Inc., supra*, 347 F.3d at pp. 677-678 [upholding $186,000 in punitives on a $5,000 compensatory award against wealthy corporate defendant for outrageous but not very harmful behavior]; *McClain v. Metabolife International, Inc., supra*, 259 F.Supp.2d at p. 1235 ["Seventy-five thousand dollars would probably not be excessive in any gross fraud case, no matter how inconsequential the actual damages were"].) But neither is it so minor, even accounting for San Paolo Holding's wealth, that it can be completely ignored, especially when imposed for conduct that led to no profit for the company; even a prosperous company would ordinarily take reasonable measures to prevent the recurrence of a $50,000 net loss. (See, e.g., *Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, 1255 [$2 million award "sends a forceful message" even to defendants worth $500 million].)

We therefore conclude $50,000 is, considering all the circumstances of this case, the maximum award of punitive damages consistent with due process.

DISPOSITION

The judgment of the Court of Appeal is reversed. The matter is remanded to the Court of Appeal with directions that it modify the superior court judgment to reduce the award of punitive damages to $50,000 and affirm the judgment as modified.

WERDEGAR, J.

WE CONCUR:

GEORGE, C.J.
KENNARD, J.
BAXTER, J.
CHIN, J.
BROWN, J.
MORENO, J.

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION 4

December 1, 2005

Lawrence Allen Abelson
Epport & Richman
1875 Century Park East
Suite 800
Los Angeles, CA 90067-2512

SIMON, LIONEL
Plaintiff-Respondent-Appellant
v.
SAN PAOLO BANK
Defendant-Appellant-Respondent

B121917
Los Angeles County No. BC152431

THE COURT:

Petition for rehearing is denied.

cc: All Counsel
File

D-1

Court of Appeal, Second Appellate District,
Division Four – B121917

SUPREME COURT
FILED
JAN 25, 2006
Frederick K. Ohlrich Clerk

DEPUTY

S139858

IN THE SUPREME COURT OF CALIFORNIA

En Banc

LIONEL SIMON,

Plaintiff and Appellant,

v.

SAN PAOLO U.S. HOLDING COMPANY, INC.,

Defendant and Appellant.

Petition for review DENIED.

Chin, J., was absent and did not participate.

GEORGE
Chief Justice

APPENDIX E

Supreme Court of the United States

No. 00A896 (00-1457)

SAN PAOLO U. S. HOLDING COMPANY, INC.

Applicant,

v.

LIONEL SIMON, dba, LIBERTY PAPER COMPANY,

ORDER

UPON CONSIDERATION of the application of counsel for the applicant,

IT IS ORDERED that the remittitur issued by the California Court of Appeal, 2nd Appellant District, on April 12, 2001, case No. B121917, is recalled and stayed pending receipt of a response, due on or before April 20, 2001, and further order of the undersigned or of the Court.

/s/ Sandra Day O'Connor
Associate Justice of the Supreme
Court of the United States

Dated this 13th
day of April, 2001

F-1

Supreme Court of the United States

No. 00A896 (00-1457)

SAN PAOLO U. S. HOLDING COMPANY, INC.

Applicant,

v.

LIONEL SIMON, dba, LIBERTY PAPER COMPANY,

ORDER

UPON CONSIDERATION of the application of counsel for the applicant, and the response filed thereto,

IT IS ORDERED that the stay of the remittitur heretofore issued by the undersigned on Friday, April 13, 2001, is hereby vacated. The application for stay of the remittitur is, in all respects, denied.

/s/ Sandra Day O'Connor
Associate Justice of the Supreme
Court of the United States

Dated this 24th
day of April, 2001

Supreme Court of the United States

No. 00-1457

SAN PAOLO U. S. HOLDING COMPANY, INC.,

Petitioner

v.

LIONEL SIMON, dba LIBERTY PAPER COMPANY

ORDER ALLOWING CERTIORARI.

Filed May 29, 2001.

The petition for writ of certiorari to the Court of Appeal of California, Second Appellate District, is granted

Supreme Court of the United States

No. 00-1457

SAN PAOLO U. S. HOLDING COMPANY, INC.,

Petitioner

v.

LIONEL SIMON, dba LIBERTY PAPER COMPANY

ON WRIT OF CERTIORARI to the Court of Appeal of California, Second Appellate District.

THIS CAUSE having been submitted on the petition for a writ of certiorari and the response thereto,

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court is vacated with costs, and the case is remanded to the Court of Appeal of California, Second Appellate District, for consideration in light of *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. __ (2001).

IT IS FURTHER ORDERED that the petitioner San Paolo U. S. Holding Company, Inc., recover from Lionel Simon, dba Liberty Paper Company Three Hundred Dollars ($300.00) for costs herein expended.

May 29, 2001

Clerk's costs: $300.00

APPENDIX H

Supreme Court of the United States

No. 01-1722

SAN PAOLO U. S. HOLDING COMPANY, INC.,

Petitioner

v.

LIONEL SIMON, dba LIBERTY PAPER COMPANY

ORDER ALLOWING CERTIORARI.

Filed April 21, 2003.

The petition for writ of certiorari to the Court of Appeal of California, Second Appellate District, is granted.

Supreme Court of the United States

No. 01-1722

SAN PAOLO U. S. HOLDING COMPANY, INC.,

Petitioner

v.

LIONEL SIMON, dba LIBERTY PAPER COMPANY

ON WRIT OF CERTIORARI to the Court of Appeal of California, Second Appellate District.

THIS CAUSE having been submitted on the petition for a writ of certiorari and the response thereto.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court is vacated with costs, and the case is remanded to the Court of Appeal of California, Second Appellate District, for further consideration in light of *State Farm v. Campbell*, 538 U.S. __ (2003).

IT IS FURTHER ORDERED that the petitioner San Paolo U. S. Holding Company, Inc., recover from Lionel Simon, dba Liberty Paper Company Three Hundred Dollars ($300.00) for costs herein expended.

April 21, 2003

Clerk's costs: $300.00

(2)

Supreme Court U.S.
FILED
JUN 8 - 2 . 5
OFFICE OF THE CLERK

No. 05-1366

IN THE

Supreme Court of the United States

SAN PAOLO U.S. HOLDING COMPANY, INC.,

Petitioner,

v.

LIONEL SIMON dba LIBERTY PAPER COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL, STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION FOUR

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

(1) Did the California court decide a substantial federal question in finding, as a matter of fact, that the private contract entered into between the parties required respondent to sequester the disputed funds but did not require respondent to pay interest to petitioner?

(2) Did the California court decide a substantial federal question in exercising discretion under Cal. Code of Civ. Proc. § 908 and finding, as a matter of fact, that petitioner had already been placed in the same position it was before payment of the principal amount and was thus not equitably entitled to interest?

(3) Did petitioner timely and properly raise a substantial federal question?

(4) Do procedural rules, which have historically allowed courts to exercise discretion in awarding interest on restitution claims, violate the Fourteenth Amendment?

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Respondent Lionel Simon d.b.a. Liberty Paper Company ("Simon") submits this brief in opposition to the Petition for Writ of Certiorari filed by San Paolo U.S. Holding Company, Inc. ("San Paolo") seeking review of the California Court of Appeal unpublished decision in *Simon v. San Paolo*, No. B121917 (California Court of Appeal, Second District, November 8, 2005).

The narrow issues presented in this case arose out of a unique set of factual circumstances, decided entirely on the basis of California decisional and statutory law.

The California Court of Appeal found, as a matter of fact, that the parties had entered into a contract with each other to sequester a disputed sum of money, representing a punitive damage award against San Paolo, while an appeal was pending. The California Court further found that this contract did not provide for payment of interest to San Paolo in the event it was successful in its appeal.

Further, restitution is, traditionally, an equitable concept. In California, as in other state and federal courts, a court will generally have discretion to award interest, based on equitable factors. Here, the California court exercised its discretion and considered the following factors: Simon did not have use of the sequestered funds during the pendency of the appeal; Simon would not have been entitled to additional interest if he, and not San Paolo, had been successful; and, San Paolo should not be placed in a better position than it would have been had it not defrauded Simon. Rather, the California court made a finding of fact that San Paolo was placed, as far as possible, in the same position it was before entering into the contract with Simon to sequester the disputed funds.

Based on the above, it can be seen that the California court decided the issue entirely on adequate and independent state grounds, and did not decide a substantial federal question. The California court never touched upon the Fourteenth Amendment or any due process argument, nor was it asked to – petitioner did not raise any due process issue in a proper or timely manner, or at all.

Finally, the relief San Paolo requests cannot be granted. There is no support for the contention that in all cases of restitution, an award of interest (at ten percent per annum) is constitutionally mandated or that traditional notions of equity and court-exercised discretion violate the Fourteenth Amendment. The Petition for Writ of Certiorari is premised upon the argument that it is "necessary for this Honorable Court to grant certiorari in order to settle this conflict and provide guidance and uniformity" among the state and federal courts with respect to when, and under what circumstances, interest will be awarded. But every state, appropriately and historically, has determined for itself under what circumstances interest has been awarded, the appropriate rate of interest, and whether the award of interest will be mandatory, discretionary, or not awarded at all. As this Court recognized over 100 years ago, the states are free to enact and apply rules regulating the payment of interest where, as here, there is no argument that the exercise of discretion was arbitrary, or capricious, or selectively enforced; or that the statute is unconstitutionally vague or indefinite and where petitioner received adequate notice and had an opportunity to be heard.

STATEMENT OF THE CASE

Factual Background

a. *Trial*

On June 12, 1996, San Paolo and Simon executed a letter of intent agreeing to all essential terms with respect to the sale of uniquely situated real property. San Paulo advised Simon that the agreement was binding. At trial, Simon introduced evidence that the letter of intent was originally drafted with an express statement to that effect, but was later fraudulently altered by San Paolo. The agreement also contained a provision whereby Simon and San Paolo agreed to exclusively negotiate with each other.

Simon incurred significant costs in consummating the transaction. San Paolo then breached the contract in bad faith, secretly negotiating the sale of the property with another buyer. The trial was replete with numerous details of San Paolo's fraudulent representations, and subsequent coverup.

On June 21, 1996, Simon filed its complaint against San Paolo for *inter alia*, false promise and breach of contract. The first trial resulted in a verdict in favor of Simon, the jury finding fraud against San Paolo, and awarding compensatory damages in the amount of $5,000. Simon's actual loss was approximately $400,000, because he contracted to buy the property for $1,100,000 and it was worth $1,500,000. But California law does not permit recovery of "loss of benefit of the bargain" damages in real estate transactions such as this one. Cal. Civ. Code § 3343.

By clear and convincing evidence, the jury also found that San Paolo was guilty of malice, oppression or fraud and awarded punitive damages in the amount of $2,500,000. The trial court granted San Paolo's motion for new trial on the issue of punitive damages only.

On March 9, 1998, the second trial commenced, and the second jury to hear this case returned a verdict of $1,700,000 in punitive damages. This finding and award was confirmed by the trial judge under a de novo review. Cal. Code Civ. Proc. § 657.

b. ***Appellate Review 1996-2001***

On August 28, 2000, the California Court of Appeal affirmed the award of punitive damages, and San Paolo's Petition for Rehearing was denied.

San Paolo filed a petition for review to the California Supreme Court, which was denied *en banc*, December 13, 2000.

The decision became final under California law, and Simon properly made demand on San Paolo's surety for payment on San Paolo's undertaking.

San Paolo then sought a writ of certiorari before this Court and sought an immediate stay of execution by this Court, which was initially granted. Simon presented opposition, providing evidence that San Paolo's surety, Amwest Surety Insurance Company, had been downgraded, and thus there was a concern that any delay in collection might result in Simon not getting paid when the case was finally resolved. At that time, San Paolo had already liquidated all of its assets.

Upon that showing, this Court vacated the stay, whereupon Simon had the unconditional right to demand that the surety pay him the total judgment without restriction.

But San Paolo did not want the surety to pay the judgment and did not want to post another bond with a financially sound

surety, which would have supported the request for a stay. Desiring to amicably resolve the issue to the satisfaction of both parties, Simon negotiated the "2001 Deposit Agreement" with San Paolo.

Under that agreement, San Paolo offered to pay the judgment subject to two conditions. One of those conditions required proof that the funds would be deposited into an insured deposit account. The other condition provided as follows:

> . . . Mr. Simon will continue to refrain from transferring, dispersing, or otherwise dissipating the funds paid to him under the Judgment until the action is finally resolved.

(Letter of San Paolo's counsel May 2, 2001.)

The purpose of this condition was to ensure that a fund would be available for San Paolo to be repaid if the case was reversed or modified. Simon accepted this offer and, as the Court of Appeal recognized, fulfilled the special conditions.

San Paolo did not negotiate for, and did not obtain, an agreement to place the money in an interest bearing account. San Paolo did not negotiate for, and did not obtain, an agreement on Simon's part to pay interest at ten percent, at seven percent, or at any percent. Rather, San Paolo negotiated for, and obtained, an agreement to have the funds secured in an insured deposit account.

This agreement benefitted both parties. It protected Simon from the risk of not being paid by San Paolo – then in liquidation and unwilling to post a bond – if the decision was affirmed. And, in the event Simon had to repay the judgment to San Paolo, San Paolo would look solely to the

deposited funds. In exchange, Simon gave up the right to use the money, or to invest in a manner yielding a higher return. Indeed, had San Paolo made the payment conditioned on ten percent interest, Simon would never have entered into the agreement, would have simply demanded full payment from the surety and would have had the use of the money without restriction.

The agreement also benefitted San Paolo. If the judgment was reversed or modified, San Paolo had the security of knowing the amount it deposited would be repaid and not dissipated by Simon. Thus, San Paolo was not "forced by a court" to pay the punitive damage award, as misrepresented to this Court by San Paolo. (See Petition for Writ of Certiorari; question presented (ii).) It did so pursuant to a contract to which it had voluntarily agreed.

On May 29, 2001, this Court granted review, vacated the opinion of the California Court of Appeal, and remanded, without argument, directing the appellate court to reconsider the decision in light of *Cooper Industries Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001) .

c. *Appellate Review 2001-2006*

On November 7, 2001, the Court of Appeal affirmed the award based on a de novo review of the reasonableness of the award. On February 20, 2002, the California Supreme Court again rejected San Paolo's petition for review.

On May 20, 2002, San Paolo filed a second petition for writ of certiorari before this Court. On April 21, 2003, this Court remanded the case for review in light of *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003).

On December 2, 2003, the Court of Appeal again affirmed the award in a published opinion, finding that San Paolo's conduct was "reprehensible" and that it was permissible to consider the "actual harm" suffered by plaintiff in calculating the *Campbell* punitive damage ratio. As noted above, the "actual harm" suffered by Simon as a result of San Paolo's deceitful conduct exceeded $400,000.[1]

A petition for rehearing was rejected. However, on March 24, 2004, the California Supreme Court granted San Paolo's third petition for review and, on June 16, 2005, issued its opinion, finding that only legally compensable damages could be considered in analyzing the *Campbell* ratio. The California Supreme Court reduced the award of punitive damages from $1.7 million to $50,000.[2]

After that opinion was issued, Simon immediately tendered to San Paolo the total amount paid by San Paolo pursuant to the 2001 Deposit Agreement, less the amount of the final judgment. The final judgment in favor of Simon was $95,889.91. That amount included interest through the date of the original payment in 2001.[3] San Paolo rejected the tender and demanded an additional $900,000 in "interest."

---

1. *Simon v. San Paolo U.S. Holding Co., Inc.*, previously published at 113 Cal. App. 4th 1137, 7 Cal. Rptr. 3d 367 (2003).

2. *Simon v. San Paolo U.S. Holding Co., Inc.*, 35 Cal. 4th 1159 (2005).

3. The original judgment was for $1,705,000. Costs had been agreed to pursuant to stipulation at $18,374.80. The new judgment was for $55,000 in principal, $22,505.01 in interest – from April 8, 1998 through May 2, 2001 (1,120 days) – when San Paolo originally paid the judgment amount. Simon provided a credit to San Paolo of an additional $20,000 arising out of San Paolo's contribution to a settlement with the broker, leaving a balance of $2,156,304.20.

As a result of that demand, Simon filed a motion before the California Court of Appeal, where jurisdiction was then pending, for a determination of the parties' rights and obligations regarding interest. Prior to filing the motion, San Paolo and Simon negotiated yet another agreement by which San Paolo accepted the tender of $2,156,304.20 subject to a reservation of rights as to its demand for interest.

The Court of Appeal, after adequate notice to the parties and extensive briefing on all of the issues, including supplemental briefing, ultimately denied San Paolo's demand for additional interest. A petition for rehearing was denied, and San Paolo petitioned the California Supreme Court for review, which petition was denied on January 25, 2006.

NO FEDERAL QUESTION WAS DECIDED

A substantial federal question is necessary to invoke the certiorari jurisdiction of the Supreme Court. 28 U.S.C. § 1257(a); *Angel v. Bullington*, 330 U.S. 183 (1947); *Equitable Life Assurance Society v. Brown*, 187 U.S. 308 (1902); *Zucht v. King*, 260 U.S. 170 (1922).

"Review on a writ of certiorari is not a matter of right, but of judicial discretion" and a petition "will be granted only for compelling reasons." U.S. Sup. Ct. R. 10. Under Rule 10(b), this Court may consider whether a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or a United States court of appeal. This Court may also consider whether a state court has decided an important federal question that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court. (Rule 10(c).) These Rule 10 considerations are not present here.

The California Supreme Court did not decide a federal question, important or otherwise, nor did the California Court of Appeal. Rather, the Court of Appeal decided a question of contract interpretation under California common law and, as an alternative basis for the ruling, the Court of Appeal decided a question arising under California statutory law – namely, Cal. Code of Civ. Proc § 908 (hereafter "section 908"). It follows that the California Court of Appeal decision, as affirmed by the California Supreme Court, does not conflict with decisions of another state court or the United States court of appeal, or any relevant decision of this Court, because no other court has jurisdiction over interpretation of the California decisional law and statutes at issue.

Apparently recognizing the above, San Paolo suggests three bases for federal jurisdiction here: the fact that the punitive award was reduced after remand from this Court; application of the National Bank Act (12 U.S.C. § 91); and due process constraints of the Fourteenth Amendment. As set forth below, the California courts did not decide any issue relating to these purported bases for jurisdiction.

NO FEDERAL QUESTION ARISES BY VIRTUE OF THE BASIS UPON WHICH THE VERDICT WAS REDUCED

The fact that this particular case involved a reduction of a punitive damage award, based on a federal constitutional question recently decided by this Court, is irrelevant to the issue presented now. San Paolo cites no authority for the proposition that the certiorari jurisdiction of this Court does – or should – extend to every aspect of a case once the Constitutional issue raised has been finally resolved.

Further, section 908 is applicable to any restitution-after-appeal claim in California. The application of the rule has no relationship to *why* restitution was ordered.

THE STATE COURT DID NOT DECIDE ANY ISSUE ARISING FROM THE NATIONAL BANK ACT

While the California Court of Appeal asked for briefing on whether the National Bank Act applied, San Paolo denied that it was subject to the Act, and denied that the Act applied. The Court of Appeal agreed, stating that the Act was unhelpful to its analysis. Based on its earlier position, San Paolo should be judicially estopped from asserting that the Act applies. In any event, the Act, if it did apply, would have simply provided another equitable factor *against* San Paolo's demand for interest for the court to have considered in exercising its discretion. Finally, nothing in the Act, itself, purports to preempt the discretionary aspect of section 908, and San Paolo cites to no such provision.

THE STATE COURT DID NOT DECIDE ANY ISSUE ARISING FROM THE FOURTEENTH AMENDMENT BUT RESTED ITS DECISION ON ADEQUATE AND INDEPENDENT STATE GROUNDS

Although San Paolo suggests that the above issues might give rise to a basis for certiorari jurisdiction, San Paolo concentrates on the argument that section 908 is facially unconstitutional. The principal question presented by San Paolo's petition is whether the Fourteenth Amendment requires states to enact mandatory, not discretionary, interest statutes following restitution after a reversal on appeal. The California court did not decide this question, but simply applied California law. This Court will not review state court decisions that rest on independent and adequate state grounds. *Fox Film Corp. v. Muller*, 296 U.S 207 (1935). The Court has no power to review state determinations of purely state law. *International Longshoremen's Ass'n v. Davis*, 476 U.S. 380 (1986). Matters of state law are not the court's concern. *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120 (1945). Rather, the state courts are the appropriate tribunals to decide

issues of purely state law. *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590, 618 (1875).

A review of the Court of Appeal decision demonstrates that the court did not address the question of whether section 908 violated the Fourteenth Amendment. Nor, was it asked to. Rather, the Court of Appeal interpreted and applied section 908, which provides as follows:

> When the judgment or order is reversed or modified, the reviewing court may direct that the parties be returned so far as possible to the positions they occupied before the enforcement of or execution on the judgment or order. In doing so, the reviewing court may order restitution on reasonable terms and conditions of all property and rights lost by the erroneous judgment or order, so far as such restitution is consistent with rights of third parties and may direct the entry of a money judgment sufficient to compensate for property or rights not restored. The reviewing court may take evidence and make findings concerning such matters or may, by order, refer such matters to the trial court for a determination.

The California court properly rejected San Paolo's argument that it was inequitable for it not to be compensated for the loss of use of the money. San Paolo argued to that court, as it does to this Court, that it only paid the judgment because Simon threatened to execute on the judgment, and refused to accept a bond. But, the Court of Appeal found that "San Paolo's own evidence and opposition to the motion casts doubt on this contention." The court noted that in a July 3, 2001, letter from San Paolo's counsel to Simon's counsel, San Paolo agreed to post a bond in the same amount as previous bonds, but only in exchange for the return of the

judgment amount paid by San Paolo **plus ten percent interest** from the date of the payment. Since, as the court recognized, there was no circumstance under which San Paolo would be entitled to ten percent interest, this offer was no offer at all.

Although San Paolo argued that Simon "demanded" San Paolo pay the money, that Simon kept and profited from the use of the money, and that Simon refused to accept San Paolo's repeated offers to post a new appeal bond, the Court of Appeal found this version of the facts to be false. Instead, the Court of Appeal found that the parties had voluntarily entered into a contract to resolve the issue of what should happen to the money while the appeal was pending. In fulfillment of the terms of that contract, Simon secured the money in a insured deposit account, and did not have the use of the money. This finding was based on letters between counsel documenting the contract. San Paolo's strategy, here and in the state court, has been to simply ignore the existence of the contract. In light of the clear evidence of such an agreement, San Paolo's credibility with the California Court of Appeal was strained, a factor the court was also entitled to consider in exercising discretion.

The Court of Appeal also rejected, as a factual matter, San Paolo's suggestion that Simon wrongfully refused to make restitution upon reversal of the judgment. Rather, the court correctly found, on the facts presented to it, that Simon promptly attempted to make restitution, even before the remittitur issued on July 21, 2005, and that it was San Paolo who rejected that tender, returned the check, and, again, wrongfully demanded interest at the rate of ten percent per annum.

These highly fact intensive issues, upon which the Court of Appeal decision rested, cannot be of any concern to this Court.

The Court of Appeal further recognized that Simon himself could not have recovered prejudgment interest on the punitive damages, since under California law, prejudgment interest is not allowed on punitive damages. *Citing, Lakin v. Watkins Associated Ind.*, 6 Cal. 4th 644, 662, 664 (1993). The Court noted that Simon would not even have been able to recover prejudgment interest on compensatory damages under California law, unless such damages were subject to calculation. (Cal. Civ. Code § 3287). In this case, the amount to be restored to San Paolo was not calculable prior to the reversal by the California Supreme Court. Mutuality of remedy is an equitable factor which a court may, rationally, consider.

The Court of Appeal also interpreted California decisional law, specifically *Textron Financial Corp. v. National Union Fire Insurance Co.*, 118 Cal. App. 4th 1061 (2004) and decided that it was proper under section 908 to consider the despicable conduct underlying the punitive award in the first instance. San Paolo had argued that *Textron* could be read to prohibit consideration of the underlying conduct. However, the Court of Appeal correctly noted that *Textron* did not so hold. *Textron* simply stated that denying interest to a defendant would be inequitable if based *solely* upon consideration of the defendant's conduct that gave rise to the liability in the first place. *Textron* did not hold it was *never* proper to consider the conduct of a defendant in the underlying case. The reviewing court should decide whether to award interest in light of long established principles of equity. As the *Textron* court said: "Our power to award interest under Code of Civ. Proc. § 908 is discretionary and may be denied if to do so would be inequitable under the circumstances." *Holmes v. Williams*, 127 Cal. App. 2d 377, 379 (1954).)

The Court of Appeal then correctly considered that no salutary purpose would be served by imposing interest as damages upon Simon. The court concluded, as a matter of fact and "so far as possible," that Simon's tender, on July 15, 2005, in the amount of $2,156,304 returned the parties to the positions they occupied before San Paolo's payment of the judgment. The court also concluded that satisfying San Paolo's demand would reward San Paolo – the tortfeasor, guilty, by clear and convincing evidence, of oppression fraud or malice – with a judgment of nearly $1,000,000 against the victim of its fraudulent conduct. Obtaining a nearly million dollar benefit is "clearly not [San Paolo's] position prior to the satisfaction of the judgment."

The factual determination that San Paolo has been placed in the same position it was at the time of the payment of the judgment is not assailable in this Court. Therefore, in order to disturb the judgment, this Court would have to rule that the Fourteenth Amendment requires that a party who has been returned to the position it occupied before payment of a judgment, is nonetheless entitled to a *bonus*. San Paolo cites no authority that supports this startling proposition.

Most significantly for purposes of this Opposition, it is clear from the above, and from the decision itself, that the matter was decided entirely on independent and adequate state grounds and no substantial federal question was addressed.

NO FEDERAL QUESTION WAS RAISED IN THE STATE COURT

A substantial federal question must have been raised in a proper and timely manner in the state court. While no particular form of words or phrases is essential, the claim of invalidity and the ground upon which petitioner relies must be brought to the attention of the state court with "fair

precision and in due time." *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928); *Street v. New York*, 394 U.S. 576, 581-585 (1969).

This Court traditionally has refused to consider federal questions raised for the first time before the Court. *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969). The Court only reviews federal questions which have been "pressed or passed upon" by state courts, with very rare exceptions. *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Illinois v. Gates*, 462 U.S. 213, 218-219 (1983). As set forth above, a review of the California Court of Appeal decision plainly shows that no federal question was presented or decided.

San Paolo did not argue the application of the Fourteenth Amendment to the state court. In the Petition for Writ of Certiorari, San Paolo identifies the issues raised in the state court and due process is not included. (Pet. for Writ of Cert., p. 11-12.) This is dispositive.

San Paolo disingenuously claims that it "relied on federal authority." (Pet. Writ of Cert., p. 13.) But the federal cases cited by San Paolo to the California court, and to this Court, do not hold that state rules which allow discretion in awarding interest on restitution claims violate the Fourteenth Amendment, and were never cited by San Paolo for this purpose. These cases do not, moreover, support the exercise of certiorari jurisdiction now.

For example, the jurisdiction of this Court in the case of *Baltimore & O.R. Co. v. U.S.*, 279 U.S. 781 (1929) was expressly conferred by the Urgent Deficiencies Act of October 22, 1913, 38 Stat. 219, and appeal was from a judgment of the United States District Court for the Northern District of Illinois. Importantly, this Court recognized that the restitution question presented there was "in effect an

equity proceeding" and that the lower court should have issued an opinion, cited to authority, set forth its statement of reasons for denying restitution, and referred the question to a master to ascertain the amount of restitution. While this Court did state that the amount awarded *in that case* should include interest ("at the rate established by the law of the state in which sums were paid,") nothing in this opinion remotely supports the argument that interest on amounts paid in restitution is Constitutionally mandated.

In *Moore v. Drewy and Associates, Inc.*, 945 F. Supp. 117 (E.D. Va. 1996), a contract action was filed in the United States District Court for the Eastern District of Virginia. Virginia substantive law applied. The district court ruled in favor of plaintiff. Defendants appealed to the Fourth Circuit Court of Appeal. One of the defendants did not post a supesedeas bond to prevent collection. Plaintiff executed upon the judgment while the appeal was pending. The Fourth Circuit certified a particular issue to the Virginia Supreme Court and then reversed the judgment. Defendant moved for an order of restitution for the judgment previously paid. Plaintiff claimed that defendant, in order to recover the funds, would have to file a new complaint.

Based on federal decisional law, and the equitable power to make restitution which "lies within the inherent equitable jurisdiction" of courts, the district court ordered restitution. No issue of due process was raised or decided in this case. Rather, *Moore* supports Simons' position that discretionary restitution rules, which are grounded in equity and are intended to return the parties to status quo, are not unconstitutional.

The *Moore* court also decided that it was equitable to award interest (at the federal post-judgment rate) – *because* plaintiff "has had the use of this money since it was received." (*Id.* at 122.) In contrast, the California Court of Appeal found,

as a matter of fact, that Simon did *not* have the use of the money and therefore it would be *inequitable* to require Simon to pay interest. Even if there could be a "conflict" between a federal court applying federal decisional law and a California court applying California statutory and decisional law, there is no conflict here. Both the *Moore* court and the California court recognized the discretionary, equitable nature of restitution. The different result is explained by different facts.

Similarly, in *Globe Indemnity Co. v. Puget Sound Co., Inc.*, 154 F.2d 249 (1946), the Second Circuit Court of Appeal held that the party who "*had the use of this sum*" during the relevant period should pay interest. The court further stated that "*in the situation here presented*" – i.e., where the party had the use of the money – the award of interest was not discretionary. In context, the *Globe Indemnity* court clearly meant that the district judgment had abused its discretion. There is no good faith argument that the *Globe Indemnity* court created a constitutionally mandated rule that interest *must* be awarded in all cases of restitution after appeal. There is no mention in the opinion of due process or the Fourteenth Amendment. Rather, the court found it was "just" to award interest in that particular case, recognizing the inherently equitable – not Constitutional – basis for the holding. (*Id.* at 250.)

Again, Simon, unlike the party in *Globe*, did not have the use of the money – as a direct result of the conditions imposed by San Paolo upon the sequestering of the funds.

Perhaps the most far-fetched of the citations brought to this Court's attention by San Paolo is *United States v. Jaffe*, 314 F. Supp. 2d 216 (S.D.N.Y. 2004). The case concerned the proper rate of interest applicable to a convicted criminal's sentence of restitution for violation of 18 U.S.C. § 1014. The court interpreted the Mandatory Victim Restitution Act

of 1996, 18 U.S. C. §§ 3663A(a)(1); 3663A(c)(1)(A)(ii); 3664(f) (1)(A); 3663(a)(1)(A); 3664(f)(2); and N.Y.C.P.L.R. § 5004. (*Id.* at 223-224.) *Jaffee* is wholly inapplicable.

THE FOURTEENTH AMENDMENT DOES NOT PROHIBIT PROCEDURAL RULES WHICH HAVE HISTORICALLY ALLOWED COURTS TO EXERCISE DISCRETION

Whether the California Court of Appeal's exercise of discretion in this case was merely erroneous obviously presents no federal question. San Paolo does not even argue that the exercise of discretion was arbitrary, capricious, or selectively enforced; or that the statute is unconstitutionally vague or indefinite; or that San Paolo did not receive adequate notice or the opportunity to be heard.

Instead, San Paolo argues for a "uniform" rule mandating an award of interest in all cases of restitution after a judgment has been paid pending appeal. In other words, San Paolo must show that the Fourteenth Amendment *prohibits* procedural rules which have historically allowed state and federal courts to exercise discretion in determining whether interest should be awarded on restitution claims, following an appellate reversal, even where the defendant has already been put in the same position it occupied before payment of the money.

Nothing in the Fourteenth Amendment or in Due Process jurisprudence supports San Paolo's argument.

The Fourteenth Amendment, in relevant part, provides that a State shall not deprive any person of property, without due process of law. Property interests are not created by the Constitution, but rather by an independent source, such as state law, or contract. *Munson v. Friske*, 754 F. 2d 683 (C.A. Wis. 1985); *Harrison v. Housing Auth. of City of College*

Park, 445 F. Supp. 356 (D.C. Ga. 1978); *aff'd* 594 F. 2d 863; *Sullivan v. Brown*, 544 F. 2d 279 (C.A. Tenn. 1976). Here, state law does not afford petitioner a property right to interest in this situation, and the Fourteenth Amendment is not implicated.

This proposition, in the context of state rules governing entitlement to interest, was expressly recognized by this Court in *Morley v. Lake Shore & M. S. Ry Co.*, 146 U.S. 162 (1892), where this Court long ago held that the allowance of interest is a matter within the legislative discretion of a state. This Court further held that where the claims of a citizen under a state statute regarding interest have been adjudicated by the highest court of that state, the citizen is not deprived of property without due process of law. San Paolo did not cite this Court to *Morley* – prior authority of this Court, on point, rejecting its present argument.

See also Nichols v. T.I.M.E., 373 F. Supp. 811 (E.D. Okl. 1973) (Oklahoma statute providing for prejudgment interest when court accepts jury verdict and renders judgment is not unconstitutional taking of property without due process of law); *Laudenberger v. Port Authority of Allegheny County*, 436 A. 2d 147, 496 Pa. 52 appeal dismissed 456 U.S. 940 (1981) (Pa. Rule of Civ. Proc. § 238 pertaining to prejudgment interest where defendant does not make sufficient offer to settle is not unconstitutional taking of property without due process); *Mitchell v. Flandro*, 96 Idaho 236, 526 P. 2d 841 (Idaho 1974) (where judgment creditor given permission to contest calculation of interest under Idaho law, no due process violation).

Further, federal law, in various contexts, provides for discretionary awards of interest. *See, e.g., Dishman v. UNUM Life Ins. Co. of America*, 269 F.3d 974, 988 (9th Cir. 2001); *Shaw v. International Assoc. of Machinists*, 750 F.2d 1458

(9th Cir. 1985) (whether to award prejudgment interest under ERISA is a question of fairness, lying within the court's discretion, to be answered by balancing the equities); *Grosz-Salomen v. Paul Revere Life Ins. Co.*, 237 F.3d 1154, 1164 (9th Cir. 2001) (post-judgment rate of interest under ERISA depends on equities of that particular case). Thus, prohibiting the state courts from exercising discretion, while the federal courts continue to do so, will not promote "uniformity."

THE CALIFORNIA COURT DID NOT DECIDE ANY SUBSTANTIAL FEDERAL QUESTION RELATING TO THE RATE OF INTEREST

San Paolo also argues in support of a federally mandated rate of interest of ten percent, applicable to all states and to federal courts – presumably for all purposes. This is a particularly odd argument since ten percent is not even the federal rate of interest. 28 U.S.C. § 1961 ("equal to the weekly average one-year contract maturity Treasury yield").

The California Court of Appeal correctly observed that the ten percent interest San Paolo demands is an amount that accrues, under California law, only upon judgments. Cal. Code of Civ. Proc. § 685.010. The maximum permissible rate of interest, prejudgment, is seven percent. Cal. Const., art. XV, § 1. Under California law, prejudgment interest may be recovered from a tortfeasor from the date when the damages are readily ascertainable. Cal. Civ. Code § 3287. Prejudgment interest is not allowable when the amount of damages is not readily ascertainable, but must be resolved by accord, verdict or judgment. In this case, the California Court of Appeal correctly recognized that Simon is not a tortfeasor, and the amount of "damages" (restitution) that would ultimately have to be paid to San Paolo was never ascertainable until the moment the California Supreme Court finally ruled.

As recognized by the Court of Appeal, the interest actually earned on the deposited funds was less than two percent, and the maximum legal rate on a debt not reduced to judgment is seven percent. Cal. Const., art. XV, § 1, Cal. Code of Civ. Proc. § 685.010. (Court of Appeal Opinion, fn. 4.)

Thus, in no way did the California Supreme Court, or the California Court of Appeal, decide, or even touch upon, any federal question relating to the proper rate of interest, nor did San Paolo argue for a constitutionally mandated interest rate of ten percent. Rather, as is apparent from reading the Court of Appeal decision, the issue was decided on adequate state grounds and was decided exclusively upon those grounds.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 05-1366

IN THE

Supreme Court of the United States

SAN PAOLO U.S. HOLDING COMPANY, INC.,

Petitioner,

vs.

LIONEL SIMON, dba LIBERTY PAPER COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEAL OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION FOUR

PETITIONER'S REPLY BRIEF

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In support of its Petition for Writ of Certiorari (the "Petition"), Petitioner San Paolo U.S. Holding Company, Inc. ("San Paolo"), hereby responds to the Brief in Opposition (the "Opposition Brief") filed by Respondent Lionel Simon, dba Liberty Paper Company ("Simon"), as follows:

INTRODUCTION

In the Petition, San Paolo presents for this Honorable Court's review five questions of wide-ranging importance to civil litigants and courts throughout the Nation, especially in light of this Court's recent decisions in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001) and *State Farm Mut. Auto. Ins. Co. v. Campbell,* 538 U.S. 408 (2003) clarifying the constitutional limitations on punitive damage awards. In his Opposition Brief, Simon ignores these issues and instead focuses on his own inflammatory, revisionist description of the facts of this case in an attempt to divert this Court's attention from these issues of paramount public interest and concern. In addition, Simon fails to explain why those who receive payment on constitutionally excessive punitive damage awards should not be required to compensate those who have been compelled to pay such awards for the loss of use of their funds.

In his Opposition Brief, Simon relies upon incorrect interpretations of the facts and the law while at the same time ignoring San Paolo's arguments, the facts of the case and applicable law. Simon improperly focuses on his erroneous interpretation and discussion of a "contract" between the parties (which, as Simon recognizes, did not in any way mention or have anything to do with interest) to avoid both the constitutional issues and the inescapable conclusion that San Paolo is entitled to interest. Simon even admits that he earned interest on San Paolo's funds, but cannot explain why he should keep it, other than his disagreement with the

decisions of both this Honorable Court and the California Supreme Court.

Simon also ignores the simple truth that the issues presented in this Petition arise out of the ruling of this Court during the pendency of the first Petition by San Paolo. This is sufficient to give this Court jurisdiction to grant this Petition and once again reverse the judgment of the Court of Appeal. There is no reason to require additional issues to create jurisdiction (even though they exist). This Petition is patently related to the two prior Petitions which were granted by this Court and this Court's denial of a stay in this matter, as a result of which Simon collected and kept the excessive award. The Petition is also related to the determination by the California Supreme Court pursuant to the recent decisions of this Court that the punitive damage award to Simon was constitutionally excessive and must be reduced from $1,700,000 to $50,000. Most importantly, Simon fails to and cannot explain why he and his counsel are entitled to retain over four years of earnings on an unconstitutional punitive damage award of over $2,000,000 which they never should have received.

ARGUMENT

Restitution is a legal, constitutional (not just an equitable) right, especially where, as here, the payment was the direct result of judicial action. Simon and his agents had possession of and used San Paolo's money and benefitted by, among other things, receiving interest thereon. In contrast, San Paolo is patently in a worse position due to the loss of the use of over $2,000,000 for over four years.

Simon attempts to avoid review by claiming that the Court of Appeal "never touched upon the Fourteenth Amendment or any due process argument, nor was it asked to . . ."

(Opposition Brief, p. 2.) To the contrary, the infringement of San Paolo's constitutional rights as a result of the grossly excessive punitive damage award has been at the very heart of San Paolo's Appeal for the past eight years and has been addressed by the Court of Appeal, the California Supreme Court, and this Honorable Court. Further, Simon's analysis is inapplicable, because, here, the issue arose as a result of this Honorable Court's denial of San Paolo's stay application during the pendency of its first Petition.

The issues presented by this Petition travel well beyond Simon's narrow view of this case as requiring just "contract interpretation under California common law." The right of a defendant to interest on a grossly excessive punitive damage award which it has been compelled to pay and is subsequently reversed (here, approximately four years later) is indeed an important federal constitutional matter which commands the attention of this Honorable Court. As Simon acknowledges, "this particular case involved a reduction of a punitive damage award, based on a federal constitutional question recently decided by this Court." (Opposition Brief, p. 9.) Simon, however, mistakenly asserts that "the Constitutional issue raised has been finally resolved." (*Id.*) Unless and until San Paolo is compensated for the damage it has suffered as a result of having been compelled to pay an unconstitutional punitive damage award, the constitutional issues in this case and infringement of San Paolo's rights remain unresolved.[1]

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[1] Similarly, the constitutional limitations on punitive damage awards continue to evolve. This Court recently agreed to review a $79.5 million punitive damage award (over 152 times the compensatory damage award) to the widow of an Oregon smoker against Philip Morris. *Philip Morris v. Williams*, United States Supreme Court Docket No. 05-1256. As the judicial scrutiny and concomitant reduction of constitutionally excessive punitive damage awards climbs, so will claims for restitution of sums paid (including interest thereon) by the victims of such awards. Accordingly, now is an opportune time for the settlement of these critical issues.

Contrary to Simon's misconstruction of San Paolo's Petition, the central issue is whether the Fourteenth Amendment requires that victims of excessive punitive damage awards who are compelled to pay those awards and who subsequently obtain a reversal or reduction thereof are entitled to compensation for the loss of the use of those funds which should have never been paid. San Paolo is not asking this Honorable Court to mandate that all states enact "mandatory . . . interest statutes following restitution after a reversal on appeal." (Opposition, p. 10.)

Simon misses the point in his Opposition Brief. In denying San Paolo interest at Simon's request, the Court of Appeal made a legal, not a factual, determination that the victims of constitutionally excessive punitive damage awards are not entitled to be compensated for the loss of the use of the funds paid on such awards. This is confirmed by the Court of Appeal's acknowledgment that "there are few factual issues to consider" and its election to decide this matter without any hearing. (Petition, App., A-6.)

How can there be restitution of payment of a constitutionally excessive punitive damage award when the recipient is not required to return to the payor all sums earned on that award, much less interest at the same legal rate imposed upon the payor through the date of payment of the improper award? Payment of interest on such an award does not result in a "windfall" to the defendant. To the contrary, it compensates the defendant for loss of use of the funds which it should never have been required to pay. Otherwise, the reduction of the unconstitutional punitive damage award would be nullified in whole or in part by permitting the recipient to retain the benefits of the use of such funds, here, over $2,000,000.00 for over four years!

Simon's attempts to distinguish the decisions supporting this Court's authority to review the decision of the Court of Appeal are unavailing. Simon even recognizes that, in

Baltimore & Ohio R. Co. v. U. S., 279 U.S. 781 (1929), this Court determined that, in awarding restitution, interest "at the rate established by the law of the state in which sums were paid" is appropriate. (Opposition Brief, p. 16.) Simon also cannot avoid the fact that "[t]he present controversy concerns the construction and effect to be given to the mandate" of this Court and that "the proceeding below out of which the denial of restitution arose is incidental to and in effect a part of the main suit. . . . This appeal rests on the same foundation as did the first." *Id.* at 784-785.

Simon also acknowledges that, pursuant to *Globe Indemnity Co. v. Puget Sound Co.*, 154 F.2d 249 (2d Cir. 1946), the award of interest is not discretionary where the recipient had use of the money prior to the reversal of the award. In another case cited by Simon, the Court determined that the defendant was entitled to post-judgment interest, because the plaintiff "has had use of this money since it was received." *Gerald M. Moore & Son v. Drewry and Assocs., Inc.*, 945 F. Supp. 117, 122 (E.D.Va. 1996). (Opposition Brief, p. 16.) Notably, Simon does not even address the decision of the Ninth Circuit Court of Appeals in *Caldwell v. Puget Sound Elec. Apprenticeship and Training Trust*, 824 F.2d 765, 767 (9th Cir. 1987) affirming the trial court's authority to grant restitution and recognizing "the right to recover what one has lost by the enforcement of a judgment subsequently reversed . . ."

By the actions of Simon and the Courts in this case, San Paolo was improperly deprived of the use of over $2,000,000 of its money for over four years, for which San Paolo is entitled to compensation. In light of the fact that the removal of the stay by this Court during the pendency of San Paolo's first Petition led to San Paolo's being forced to pay the constitutionally excessive award of punitive damages, this Honorable Court has the authority to grant the Petition, summarily reverse the Opinion of the Court of Appeal, and

require restitution, including the payment of interest at the legal rate.[2] (Petition, App., F-1; Opposition to Motion to Determine if Interest is Owed by Plaintiff ["Motion"], Exh. "C.") The Fourteenth Amendment is implicated in the denial of full restitution to San Paolo in the same way that it was implicated by the trial court's award of a grossly excessive punitive damage award against San Paolo. The same property rights and interests are at stake.

The prejudgment interest concept first raised by Simon and adopted by the Court of Appeal has nothing whatsoever to do with San Paolo's right to interest as restitution for the illegal punitive damage award. Similarly, Simon's fallback position (that the California statutory pre-judgment rate of interest of seven percent is the maximum amount of interest which he should be charged) is erroneous. Simon claims that, since he was never sure just how much of the unconstitutional punitive damage award would be reduced, the amount was unliquidated and therefore should not be subject to the post-judgment rate of interest. The truth is that San Paolo was required to pay interest at the post-judgment rate of ten percent. (Motion, Exh. "C.") Simon elected to collect on the judgment, even though San Paolo's appeal was still pending. He assumed the risk that, should the judgment be reduced, he would have to repay the amount of the reduction plus interest at the very same rate. There is no reason to assess any different rate of interest, nor any legal basis for doing so.

The fact that Simon could not foresee the actual results in this case does not defeat San Paolo's right to compensation for the loss of use of its own money. In every case where a

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[2] Had this Court continued the stay and then denied San Paolo's Petition, San Paolo could have been held to "answer for all damages and costs which the other party may sustain by reason of the stay." 28 U.S.C. § 2101(f). There is no reason why the same rule should not equally apply where the stay is denied and the judgment is paid and later reversed.

judgment is reversed or reduced, the plaintiff can make the argument that he could not have guessed what would happen and thereby avoid paying interest. Further, on two separate occasions, this Court reversed the decisions of the Court of Appeal affirming the punitive damage award. At a minimum, this should have been a sign that the award would ultimately be reduced. Simon, however, remained defiant. (Motion, Exh. "M.")

In addition, the cases which Simon cites regarding discretionary awards of pre- and post-judgment interest do not involve or in any way address the concept of restitution, the reversal or reduction of an award on appeal, or any of the issues presented by this Petition and therefore are of no assistance to Simon. (Opposition Brief, pp. 19-20.)

Simon highlights this Court's decision in *Morley v. Lake Shore & M. S. Ry. Co.*, 146 U.S. 162 (1892) to support his assertion that the award of interest in connection with the restitution of a reversed judgment which has been satisfied is "a matter within the legislative discretion of a state." (Opposition, p. 19.) Nothing within the *Morley* decision has any bearing on any of the issues presented in this Petition, including but not limited to interest as a component of restitution generally or, more specifically, San Paolo's entitlement to interest on the unconstitutional punitive damage award which it was forced to pay to Simon and which Simon repeatedly refused to return. In *Morley*, this Court instead held that where a statute alters the interest rate accruing on a judgment previously entered, there is no due process violation. Here, the issue is not the rate of interest which should have accrued on the judgment but whether San Paolo is entitled to that same rate of interest on the constitutionally excessive portion which it was compelled to pay.

There is clearly a conflict between this case and *Textron Financial Corp. v. National Union Fire Ins. Co. ("Textron")*, 118 Cal.App.4th 1061 (2004), which Simon fails to address.

Among other things, in *Textron*, the California Court of Appeal held that the defendant's underlying conduct should not be a factor in determining whether to award interest, choosing instead a more pragmatic approach.[3] Simon and the Court of Appeal in this case disagree. Such conduct certainly should be considered in determining the propriety of the award itself, but not whether interest should be awarded on the overpayment. Doing otherwise would result in a nullification of the reduction of the award and the constitutional protections afforded to defendants against such awards which are held to be grossly excessive.

Simon misconstrues the issues presented by the Petition. With regard to the interest rate itself, San Paolo most certainly is not arguing for "a federally mandated rate of interest of ten percent, applicable to all states and to all federal courts – presumably for all purposes." (Opposition, p. 20.) This is a blatant exaggeration intended to overshadow the clear constitutional significance of the issues raised by San Paolo. The issue, instead, is a defendant's right to recover interest at the same rate which accrued on a judgment which it was required to pay and is subsequently determined to be constitutionally excessive.

Defendants such as San Paolo who have been compelled by the Courts to satisfy improper judgments can be made whole only through restitution of the loss of the use of these funds. Their constitutional rights are not fully vindicated simply by returning the money they should have never been

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[3] "Defendant paid the judgment apparently when plaintiff threatened to execute on it. Had plaintiff chosen to await termination of the proceedings in the United States Supreme Court before seeking recovery, it would be entitled to interest on the sum finally awarded. To deny defendant recovery of interest on the excessive portion of the punitive damage award would be inequitable." *Textron*, *supra*, 118 Cal.App.4th at 1086.

required to pay. In order to fully protect their constitutional rights, defendants must be awarded interest at the applicable legal rate which they were required to pay (in this case, ten percent pursuant to Cal. Code of Civ. Proc., § 685.010(a)) for the period that they were deprived of these funds. At a minimum, all profits earned by Simon and his agents on the funds paid by San Paolo must be disgorged.[4]

In his Opposition Brief, Simon does not dispute any of the figures or calculations set forth in the Petition which demonstrate that, should this Honorable Court determine that San Paolo is entitled to interest at the legal rate for the funds which it was compelled to pay to Simon on the grossly excessive judgment, then the minimum restitution due to San Paolo is $925,743.27. (Petition, pp. 27-28.) Further, Simon does not dispute the fact that he has failed to pay the costs totaling $600.00 awarded by this Court on San Paolo's two prior Petitions.

CONCLUSION

This Petition provides this Honorable Court with the opportunity to assure the uniform, meaningful application by state and federal courts across this Nation of a party's right to restitution of all things lost as a result of being forced to pay a judgment or order which is reversed or reduced on appeal. Simon does not deny that the courts are in conflict as to the right of a defendant to recover interest in connection with the restitution of a payment made on an award which is ultimately determined to be improper. This Court's intervention is required to clarify that the denial of interest in this situation is a denial of due process.

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[4] Simon even admits earning interest on the funds paid directly to him, although it was in fact greater than the two percent acknowledged by the Court of Appeal. (Opposition, p. 21.)

The latest Opinion of the Court of Appeal demonstrates that the Courts and litigants of this Nation are in need of clear guidance on a party's right to recover interest on funds paid on a punitive damage award which is subsequently determined to be constitutionally excessive. The decision of the Court of Appeal eviscerates the goal of restitution, which is to restore to the victim of an excessive judgment all rights lost as a result of the payment thereof. In light of the fact that an excessive punitive damage award violates a defendant's constitutional rights, an award of interest on the amount overpaid in furtherance of this violation is a necessity.

Defendants who have been compelled to pay judgments which are subsequently reversed or reduced need a bright-line rule and certainty when seeking restitution. The only reasonable figure is the same as the rate which accrues on judgments. For these reasons, as well as those set forth in the Petition, it is respectfully requested that the Petition for Writ of Certiorari be granted, the Opinion of the Court of Appeal reversed (summarily or otherwise), and San Paolo be awarded interest at the rate of ten percent per annum on the overpayment amount, plus costs.

Date: July 26, 2006.

Respectfully submitted,

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